SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY, APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

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[fol. 1] **IN SUPREME COURT OF MICHIGAN**

No. 37654

DETROIT INTERNATIONAL BRIDGE COMPANY, Appellant,

v.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN, Appellee

CLAIM OF APPEAL TO THE SUPREME COURT FROM THE CORPORATION TAX APPEAL BOARD

Detroit International Bridge Company, petitioner, claims an appeal from the order and determination entered on November 22, 1933, by the Corporation Tax Appeal Board of the State of Michigan. Appellant takes an appeal in the nature of a petition for a writ of certiorari.

On December 19, 1933, the Supreme Court of the State of Michigan entered an order in the above matter extending the time within which said appellant could appeal and granting leave to said appellant to appeal from said order of the Corporation Tax Appeal Board.

This claim of appeal is filed together with a petition in the nature of a petition for writ of certiorari.

Detroit International Bridge Company, by Stevenson, Butzel, Eaman & Long, Its Attorneys. Business Address: 2288 First National Bank Building, Detroit, Michigan.

Dated Jan. 31, 1934.
21/EH.

[fol. 2] IN SUPREME COURT OF MICHIGAN

[Title omitted]

PETITION FOR WRIT OF CERTIORARI ATTACHED TO CLAIM OF APPEAL

To the Honorable Judges of the Supreme Court for the State of Michigan:

Your petitioner, Detroit International Bridge Company, the appellant, respectfully shows unto this Court as follows:

1. The Detroit International Bridge Company is a Michigan corporation, which was organized on June 21st, 1927. Upon incorporation in 1927, the Detroit International Bridge Company paid to the Secretary of State the franchise or organization fee required under the provisions of Act No. 85 of the Public Acts of 1921, Sections 3 and 3a, as amended by Act No. 33 of the Public Acts of 1927. The corporation's principal office at that time was designated, has since been and is now designated, as Detroit, Michigan.

2. The Articles of Incorporation of the appellant, Detroit International Bridge Company, were amended in May 1933, so that the only corporate power with which the cor-
[fol. 3] poration was vested, in accordance with such amended articles, was as follows:

Article II

"To operate the highway bridge, known as the Ambassador Bridge across the Detroit River, from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

"To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

a certified copy of said amendment being attached hereto as part of the certified record of the Corporation Tax Appeal Board which is made a part hereof.

3. Since the filing of such amendment the Detroit International Bridge Company has had no corporate power, and since the filing of such amendment and theretofore the Detroit International Bridge Company has engaged in no other business than the operation of a highway bridge for vehicular and pedestrian traffic from Detroit, Michigan, to Sandwich, Ontario, Canada, charging tolls therefor, the entire bridge structure and appurtenances being used and operated by the petitioner, Detroit International Bridge Company, exclusively in foreign commerce.

4. Your petitioner further shows that permission and authority for the construction of said bridge was granted by

an Act of Congress of the United States of America, approved March 4th, 1921, entitled "An Act to Authorize the [fol. 4] Construction and Maintenance of a bridge across the Detroit River Within or near the City Limits of Detroit, Michigan," which act was adopted in accordance with the provisions of the Act of Congress entitled "An Act to Regulate the Construction of Bridges over Navigable Waters" approved March 23rd, 1906. Petitioner further shows that this act was amended and the time for the completion of the construction of this bridge was extended from time to time by Acts of Congress approved April 17th, 1924, March 3rd, 1925, and May 13th, 1926, your petitioner having by purchase acquired the rights and franchises of the American Transit Company, to which company these franchises for the construction of the bridge were originally granted.

Your petitioner further shows that the Canadian Transit Company, a subsidiary of your petitioner, which owns and operates the Canadian portion of the bridge structure, was granted permission and authority to construct the bridge on the Canadian side by an Act of Parliament of the Dominion of Canada, assented to May 3rd, 1921, and amended from time to time, having finally received approval of the Governor General of Canada on March 31st, 1927.

5. The Detroit International Bridge Company filed its annual report for 1933 on August 31st, 1933, and enclosed therewith a check for Two Dollars ($2.00) to cover the filing fee, with the statement that it was not liable for the payment of any annual privilege fee, since the Company then only had the power to engage in foreign commerce, and no other purpose whatsoever, and that it only did engage in such business and no other.

[fol. 5] 6. On October 26th, 1933, the Secretary of State of the State of Michigan determined that the appellant, Detroit International Bridge Company, was subject to an annual privilege tax for the year 1933 of Thirty-seven Hundred Sixty-three and 25/100 Dollars ($3763.25), plus the Two Dollars ($2.00) filing fee, a copy of said letter of determination being attached hereto as part of the certified record of the Corporation Tax Appeal Board.

7. The appellant, Detroit International Bridge Company, thereupon filed an appeal from the determination of the

Secretary of State to the Corporation Tax Appeal Board on November 3rd, 1933, and paid the requisite fee therefor, and under date of November 22nd, 1933, the Corporation Tax Appeal Board of the State of Michigan sustained the ruling of the Secretary of State and denied the appeal of your petitioner, Detroit International Bridge Company.

8. That attached hereto and made a part hereof as the record on appeal, are the following documents:

Certified copy of the Amendment to the Articles of Association of said appellant corporation, Detroit International Bridge Company, dated May 17th, 1933.

Certified record of the proceedings before the Secretary of State and the Corporation Tax Appeal Board, including the Annual Report of Detroit International Bridge Company for the year 1933.

Letter from the attorneys for the Detroit International Bridge Company to the Secretary of State, dated August 30th, 1933, enclosing and filing said Annual Report.

[fol. 6] Determination of the Secretary of State dated October 26th, 1933.

Communication from the attorneys for the Detroit International Bridge Company to the Secretary of State asking for a possible correction of a statement contained in said letter of October 26th, 1933, by the Secretary of State.

Letter dated November 13, 1933, from the Secretary of State to said counsel making such correction.

Notice of appeal to the Corporation Tax Appeal Board, dated November 3rd, 1933.

Notice of hearing before the Corporation Tax Appeal Board dated November 8th, 1933.

Determination of the Corporation Tax Appeal Board dated November 22nd, 1933.

9. The appellant, Detroit International Bridge Company, respectfully shows that it was aggrieved by the determination of the Secretary of State and the Corporation Tax Appeal Board, and submits that said determination of the privilege fee for the year 1933 is erroneous and illegal and without warrant, and not in accord with the law and facts here controlling, in the following particulars:

(1) The attempt of the State of Michigan to impose an annual privilege tax under Act No. 327 of the Public Acts of 1931, upon appellant, Detroit International Bridge Com-

pany, would violate Article I, Section 8, Clause 3, of the Constitution of the United States, since the only power with which Detroit International Bridge Company is vested [fol. 7] under its Articles of Incorporation as amended, and the only business in which it engages and has ever engaged, is the operation of an international highway bridge for vehicular and pedestrian traffic from Detroit, Michigan, to Sandwich, Ontario, Canada.

It is respectfully submitted by the appellant that because the powers of appellant corporation were limited under its corporate charter as amended, and because pursuant thereto it could and did engage only in the carrying on of its business of foreign commerce, that it would violate the commerce clause of the Federal Constitution for the State of Michigan to attempt to impose said annual privilege tax upon it for the privilege of exercising its corporate franchise, when its corporate franchise, if exercised completely, would only permit it to engage exclusively in foreign commerce. It is the claim of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax in any amount, and is only required to file its annual report and pay the filing fee therefor.

(2) That even if the Detroit International Bridge Company, appellant, were subject to the payment of the 1933 privilege fee, the value of the bridge structure and the appurtenances thereto listed as capital assets, item No. 8 in the annual report, in the amount of $8,302,699.54, should be excluded from the computation of said fee as property used exclusively in foreign commerce under the express provisions of Act No. 327 of the Public Acts of 1931.

[fol. 8] Wherefore your petitioner prays that this Court reverse the order of said Corporation Tax Appeal Board and the determination of the Secretary of State, and issue a writ in the nature of a writ of certiorari under the seal of this Court directed to the Corporation Tax Appeal Board and to Patrick H. O'Brien, Attorney General, and to John K. Stack, Jr., Auditor General, and to Theodore I. Fry, State Treasurer, constituting the Tax Appeal Board of the State of Michigan, to review and reverse the order of said Corporation Tax Appeal Board, and of said Secretary of State, and that all proceedings under said order of the Corporation Tax Appeal Board and said determination of the

Secretary of State in the computation of the 1933 privilege fee of the appellant and petitioner be thereby stayed in accordance with law until final decision is made in this case.

Stevenson, Butzel, Eaman & Long, Victor W. Klein, Attorneys for Detroit International Bridge Company.

Duly sworn to by Victor W. Klein. Jurat omitted in printing.

[fol. 9] Certificate of Secretary of State

United States of America

(Insignia)

The State of Michigan, Department of State

To all to whom these presents shall come:

I, Frank D. Fitzgerald, Secretary of State of the State of Michigan and Custodian of the Great Seal thereof, Do Hereby Certify that the annexed copy of amendment to the articles of association of the Detroit International Bridge Company, annual report of the company for the year 1933, correspondence relating thereto, and opinion of the Corporation Tax Appeal Board has been compared by me with the record on file in this Department and that the same is a true copy thereof, and the whole of such record.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol, in the City of Lansing, this Twelfth day of December, A. D. 1933.

Frank D. Fitzgerald, Secretary of State. (Seal of the State of Michigan.)

[fol. 10] Certificate of Amendment to the Articles of Incorporation of Detroit International Bridge Company

P. O. Address—Twenty-first and Howard Streets, Detroit, Michigan

We, the undersigned, being the President and Assistant Secretary, of the Detroit International Bridge Company, a corporation existing under the provisions of Act 327 of the Public Acts of 1931, do hereby certify, as required by said act:

That at a meeting of the stockholders of said corporation called for the purpose of amending its articles of incorporation and held at the office of the company on the 3rd day of May, A. D., 1933, it was resolved, by a majority vote of the stockholders or members of said corporation, that Article No. III of the articles of incorporation be and the same is amended so as to read in its entirety as follows, viz:

Article III

The purpose or purposes of this corporation are as follows:

To operate the highway bridge, known as the Ambassador Bridge, across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedes- [fol. 11] trian traffic, and to charge and collect tolls for such use.

In witness whereof, we hereunto sign our names this seventeenth day of May, A. D., 1933.

Detroit International Bridge Company (Corporate Name), by J. A. Bower, President, F. M. Radford, Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this Seventeenth day of May, 1933, before me a Notary Public in and for said County, appeared J. A. Bower, President, and F. M. Radford, Asst. Secy. of the Detroit International Bridge Company, known to me to be the person named in, and who executed the foregoing instrument, and acknowledged that he executed the same freely and for the intents and purposes therein mentioned.

Edgar A. Hansen, Notary Public, Queens County. Certificate filed in New York County, N. Y. Certificate filed in Kings County, N. Y. Queens County No. 2146 Registers No. 6033. N. Y. County No. 709 Registers No. 5-H-439. Kings County No. 55 Registers No. 5223. My commission expires March 30, 1935. (Seal.)

[fol. 12] Take notice—It is required by statute that two originals of this report be forwarded to the Secretary of State. Please note instruction page before proceeding.

August 31st is the last day for filing reports without penalty.

Michigan Annual Report

To be filed by every corporation for profit, whether domestic or foreign.

(Name of Corporation:) Detroit International Bridge Company.

(Postoffice Address:) Detroit, Michigan.

(Street and No.:) 1227 21st Street.

Frank D. Fitzgerald, Secretary of State, Lansing, Michigan.

Sir: In accordance with the provisions of Act No. 327, Public Acts of 1931, the undersigned officers of the above named company submit the following report of its condition on the 31st day of December, 1932 (Do not change this date) or (Date) —— (close of fiscal year next preceding the time for filing) or the date of incorporation during this year.

1. The place or places at which the corporation has been engaged in business during the year is (are) Detroit, Michigan.

2. Where incorporated (State): Michigan.
Date of Incorporation: June 21, 1927 (Michigan).
Date admitted: (Foreign) ——.

3. The following are the officers and directors of the corporation:

Names of officers	Postoffice addresses
Joseph A. Bower, President	165 Broadway, New York, N. Y.
Alfred C. Dent, Vice-President	100 Broadway, New York, N. Y.
Sherman D. Callender, Secretary-Treasurer	1706 Dime Bank Bldg., Detroit, Mich.
F. M. Radford, Ass't Secretary	165 Broadway, New York, N. Y.
F. M. Radford, Ass't Treasurer	165 Broadway, New York, N. Y.

Names of directors	Postoffice addresses
[fol. 13] Joseph A. Bower,	165 Broadway, New York, N. Y.
Harry M. Bawden	26 King St., East, Toronto, Ont.

Sherman D. Callender.....
1706 Dime Bank Bldg., Detroit, Mich.
Alfred A. Cook.....20 Pine Street, New York, N. Y.
John E. McAllister....68 King Street, East Toronto, Ont.
Jansen Noyes.....37 Wall Street, New York, N. Y.

4. Capital stock:

	Authorized	Issued	Stock subscribed but not issued	Par value per share
Common.....	$.....	$.....	$.....	$.....
Preferred.....	$5,000,000.00	$1,600,000.00	$.....	$100.00
Amount.....	$.....	$.....	$.....	$.....
Common Non-Par.....	100,000 shares	100,000 shares	...shares	.....

5. The following is a true statement of the assets and liabilities from the books and records of the corporation, showing the condition at the date stated, and segregated to show for the purpose of computing this tax, the nature, location and value of all property owned by the corporation both in and without Michigan, itemized as follows:

Assets	Amount	In Michigan	Without Michigan
1. Cash.....	.....	$102,702.27	$45,241.23
2. Notes and Accounts Receivable.....	$4,216.37	.....	.....
Less reserve for bad debts....	357.50	3,558.19	300.68
3. Deferred payments notes, contracts, etc.....	.....	.....	.....
*Less reserve for deferred profits.....	.....	.....	.....
4. Inventories: (To include raw materials, work in process, finished goods, supplies, etc.).....	.....	.....	.....
5. Investments.....	.....	2,585,007.97	.....
7. Deferred charges:			
Prepaid insurance.....	.....	12,310.04	7,470.87
Prepaid taxes.....	.....	*77,343.63	.....
[fol. 14]			
8. Capital assets:			
Land.....	.....	1,948,927.29	.....
Buildings.....	$6,785,968.67	.....	.....
Machinery and equipment.	.....	.....	.....
Furniture and fixtures.....	15,489.84	.....	.....
Delivery equipment.....	24,079.63	.....	.....
Franchise Rights, etc.....	1,840,077.54	.....	.....
Total.....	$8,665,615.68	.....	.....
Less reserve for depreciation and depletion....	362,916.14	8,302,699.54	.....
9. Patents (To include copyrights, trade-marks, etc.)..	.....	.....	.....
10. Good-will.....	.....	.....	.....
11. Other Assets (describe fully): Unamortized Disct. and and Expense on Funded Debt.....	.....	.....	*921,917.17

Assets	Amount	In Michigan	Without Michigan
Prepaid Easements and Rentals		223,705.28	
12. Total Assets		$13,256,254.21	$974,929.95
6. Liabilities.			
13. Notes and Accounts Payable.		5,516.48	1,086.32
14. Accrued expenses—Taxes, etc.		317,863.94	
Accrued Interest		2,099,462.95	746,129.55
15. Other Liabilities (describe fully)			
6½% First Mortgage Bonds..	$5,989,000.00		
7% S. F. Gold Debentures....	8,000,000.00		
		13,989,000.00	
16. Capital Stock:			
Preferred stock (less stock in treasury)	1,405,300.00		
Common stock (less stock in treasury)			
Non-par stock (No. of shares 100,000)	100,000.00	1,505,300.00	
17. Schedule of surplus and undivided profit (Enter deficit in red)			
Earned		4,433,175.08	
Appreciation of value			
Paid-in arising from			
Total Liabilities		$13,483,968.29	$747,215.87

[fol. 15] 7. The aggregate amount of any loans, advances, overdrafts and/or withdrawals and repayments thereof made to or by officers, directors or shareholders of the corporation otherwise than in the ordinary and usual course of business and on the ordinary and usual terms of payment and security. $—.

8. Property exclusively used in interstate commerce. Capital Assets enumerated in Items 5 and 8, Michigan and Canada, and the Furniture and Fixtures and delivery equipment used exclusively in connection therewith. (This applies to railway equipment, tank cars, steamboats, etc., when so used in interstate commerce.)* $10,251,626.83.

9. The amount of capital stock paid in (a) in cash See rider attached, (b) in property:—

(Good-will, patents, formulas, etc., or any intangible for which stock has been issued, are considered property.)

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* For record purposes only. This is a book value—showing original cost and neither represents reproduction costs, present costs, nor market value which is lower. These are bookkeeping items and do not represent assets which should enter into the computation of the tax.

No par value stock: Book value per share—See rider attached; Price fixed by corporation for sale of ——.

10. The nature and kind of the business in which the corporation has been engaged during the year: Operation of a toll bridge between Detroit, Mich. and Sandwich, Ontario.

The foregoing is a true statement of the condition of the corporation as of Dec. 31, 1932, or —— (close of fiscal year) or the date of incorporation during this year.

Witness our signatures.

Joseph A. Bower, President, and F. M. Radford, Asst. Secretary, or —— ——, Asst. Treasurer. (Corporate Seal.)

[fol. 16] State of New York,
County of New York, ss:

I, J. A. Bower, do solemnly swear that I am the president or vice-president, or secretary or assistant secretary, or treasurer, of the above named corporation, and that the matters set forth in the foregoing report are true and correct to the best of my knowledge and belief.

Joseph A. Bower, Official Signature.

Subscribed and sworn to before me, this 23rd day of August, 1933. E. C. Williams, Notary Public, New York County. New York Co. Clerk's No. 228, Register's No. 4-W-291. Kings Co. Clerk's No. 168, Register's No. 4234. My commission expires: Commission expires March 30, 1934. (Seal.)

Answer to Question No. 9

The original capitalization of the Company was 1,000 shares with no par value, for the sale of which a price of $1.00 per share was fixed; subsequently, the authorized capital stock was increased to 100,000 shares of common stock without par value and 50,000 shares of preferred stock having a par value of $100 a share. An additional 99,000 common shares, and 11,000 preferred shares, were issued as set forth in an affidavit filed with the Secretary of State at the time, a copy of which affidavit, to which reference is hereby made, was attached to our annual report for the year 1929. In addition to the foregoing, 5,000 shares of preferred stock were issued in 1930 for property.

[fol. 17] This annual report is filed pursuant to the Corporation Laws of the State of Michigan. It is the contention of the Detroit International Bridge Company, however, that it is not subject to the payment of the Annual Privilege Fee. Under its Articles of Association, as amended, the only power the corporation has is to engage in this carrying on of foreign commerce. The corporation has no power whatsoever under its articles of association to do a local business at all. It is, therefore, the position of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article 1, Section 8, Clause 3, of the Constitution of the United States.

Under the Articles of Association as amended the only power the corporation has is

"To operate the highway bridge, known as the Ambassador Bridge across the Detroit River, from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

"To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

[fol. 18] Stevenson, Butzel, Eaman & Long, First National Bank Building, Detroit

August 30th, 1933.

Secretary of State, Lansing, Michigan.

Re Detroit International Bridge Company

DEAR SIR: We enclose herewith in duplicate executed annual report for the year 1933 of our client, Detroit Inter-

national Bridge Company, a Michigan corporation, together with their check in the amount of $2.00 to cover the filing fee.

You will undoubtedly recall that after our litigation in the United States Supreme Court last year, Detroit International Bridge Company amended its articles of association in May of 1933, so as to read as follows:

To operate the highway bridge, known as the Ambassador Bridge across the Detroit River, from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use.

Under its articles of association as amended, it is now undisputable that the only power that the corporation has [fol. 19] is to engage in this carrying on of foreign commerce. The corporation has no power whatsoever under its articles of association to do a local business at all. It is, therefore, the position of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article 1, Section 8, Clause 3, of the Constitution of the United States.

May we ask that you file this report and advise us accordingly.

Your very truly, Stevenson, Butzel, Eaman & Long.

21/IMP.

(Encs.)

[fol. 20] Determination of 1933 Privilege Fee by Secretary of State

S:IS Corporation

Oct. 26, 1933.

Stevenson, Butzel, Eaman & Long, Attorneys, First National Bank Bldg., Detroit, Michigan.

Re Detroit International Bridge Co.

GENTLEMEN: We have your letter of August 30 enclosing the 1933 annual report of the above corporation with remittance of $2.00.

The fee payable on paid-up capital at the rate of 2½ mills on the dollar results in $3,765.25 including the $2.00 filing fee. Their remittance leaves a balance due of $3,763.25.

The amendment filed would not affect the 1933 report inasmuch as the statement in the report is as of December 31, 1932 and the amendment shows the date of meeting and filing in May of 1933.

Respectfully, —— ——, Secretary of State.

[fol. 21] Stevenson, Butzel, Eaman & Long, First National Bank Building, Detroit

October 30th, 1933.

Mr. Frank D. Fitzgerald, Secretary of State, Lansing, Michigan.

Attention of Corporation Division

S:IS

Re Detroit International Bridge Company

DEAR SIR: This is to acknowledge receipt of your communication of October 26th in reference to the 1933 Annual Report of the Detroit International Bridge Company in which you state that the tax should be $3,763.25.

At the close of your letter, however, the following appears:

"The amendment filed would not affect the 1933 report inasmuch as the statement in the report is as of December 31, 1932, and the amendment shows the date of meeting and filing in May of 1933."

In view of the case of In re Johnston-Newton Company, 226 Mich. 40, and other Michigan cases which have since followed that ruling, the privilege tax is paid in advance for the year commencing as of August 31st. The reference to the December 31st condition is only as to the financial condition of the Company and has no reference whatever as to the powers with which a corporation is vested and has no bearing upon the privileges for which the fee [fol. 22] is being paid. As we understand the rulings of the courts on this law, the Michigan privilege tax is for the privilege of exercising the corporate franchises from August 31st, 1933, to August 31st, 1934. On August 31st, 1933, the amendment of the Detroit International Bridge Company had been filed and it had no corporate power to do anything but to operate an international bridge company. If it were charged any privilege fee from August 1933 to August 1934, it would be for the privilege of exercising this corporate power, to wit, operating an international highway bridge company, which we submit would be an unconstitutional interference in regulation of foreign commerce.

In view of this situation as to the time when the filing of the amendment becomes effective, does not your office now concur in the acceptance of the report as filed? Your prompt advice would be appreciated.

Yours very truly, Stevenson, Butzel, Eaman & Long.

21/IMP.

[fol. 23] Notice of Appeal to Corporation Tax Appeal Board

November 3, 1933.

Hon. Patrick H. O'Brien, Attorney General, State of Michigan, Chairman of Tax Appeal Board; Hon. John K. Stack, Jr., Auditor General; Hon. Theodore I. Fry, State Treasurer, Constituting the Tax Appeal Board of the State of Michigan.

To the said Tax Appeal Board:

Re Detroit International Bridge Company 1933 Privilege Tax

A communication dated October 26, 1933, from Frank D. Fitzgerald, Secretary of State, was received by us as at-

torneys for the Detroit International Bridge Company on October 28, 1933, in which there is determined the amount of the privilege fee said to be due from the Detroit International Bridge Company on its 1933 report, in the amount of $3,765.25.

This communication constitutes the notice of the Detroit International Bridge Company to the Tax Appeal Board that the Detroit International Bridge Company conceives itself aggrieved as to the amount of such fee based upon the facts and desires a determination thereof by the Tax Appeal Board in the manner provided by the laws of the State of Michigan.

We are enclosing herewith our check in your favor in the amount of $10.00 as payment of the statutory appeal fee, we desire a hearing in this case at which hearing this office will represent the Detroit International Bridge Company.

[fol. 24] May we ask that you acknowledge receipt of this letter, sending us a receipt for the statutory fee and advising at what time you wish to have the hearing set for.

Yours very truly, Stevenson, Butzel, Eaman & Long,
Attorneys for Detroit International Bridge Company.

21/EH.

'Encl.'

AEA:IE.
Corporation.

Stevenson, Butzel, Eaman & Long, Attys., First National Bank Building, Detroit, Michigan.

In re Detroit International Bridge Company, 1933
Privilege Tax

GENTLEMEN: Acknowledging your letter of November 3, relative to the appeal of the above corporation, permit us to advise the hearing has been set for two o'clock, Tuesday, November 14, we believe the Attorney General's Office so notified you.

We are enclosing official receipt for the appeal fee.

Will you kindly have a representative present?

Respectfully, —— ——, Attorney, Corporation Division.

Enc.

[fol. 25] AEA:MM.
Corporation.

November 13, 1933.

Stevenson, Butzel, Eaman & Long, Attys., First National Bank Building, Detroit, Mich.

Attn. Mr. V. W. Klein

Re Detroit International Bridge Company

GENTLEMEN: Confirming our conversation by telephone this morning, you may disregard the third paragraph in our letter of October 26, inasmuch as the question involved in the amendment is apart from any change in the financial condition of the company which would be the only one effected by an amendment subsequent to January 1.

However, your letter of August 30, in which you enclose the annual report together with a filing fee of $2.00, carries the statement:

"Under its articles of association as amended, it is now undisputable that the only power that the corporation has is to engage in this carrying on of foreign commerce. The corporation has no power whatsoever under its articles of association to do a local business at all. It is, therefore, the position of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax imposed by the laws of the State of Michigan. * * *"

To the above statements we take exceptions. This same question, that of exemption of the Bridge Company, due to [fol. 26] the nature of its business, that of foreign commerce, was argued before our State Supreme Court and your claim disallowed. In your petition for rehearing you again stressed this question and specifically asked the court to make a ruling upon this particular point. The court refused to grant you a rehearing thus evidencing the fact it had passed upon this question in its original decision. It thereby confirmed the State's contention that the Bridge Company was liable for the tax and that it was not engaged in foreign commerce.

The fact that a corporation is engaged in foreign commerce does not exempt it from the payment of the privilege tax under the provisions of the statute, Act 85, Public Acts of 1921, as amended. This point has been definitely settled

by our Michigan Supreme Court not only in its decision in re:

Detroit International Bridge Company, 257 Mich. 52 but likewise in:

Detroit & Windsor Ferry Co., vs. the State, 232 Mich. 574.

Very truly yours, —— ——, Secretary of State.

[fol. 27] State of Michigan

BEFORE THE CORPORATION TAX APPEAL BOARD

In re Appeal of DETROIT INTERNATIONAL BRIDGE COMPANY

DETERMINATION OF CORPORATION TAX APPEAL BOARD

At an adjourned meeting of the Corporation Tax Appeal Board, held at the office of the Attorney General, November 21, 1933, at 3 o'clock, P. M., the appeal of the Detroit International Bridge Company was considered.

After giving full consideration to the certified record of the Secretary of State covering the Bridge Company's annual report for the year 1933, together with its amended Articles of Incorporation, it is the opinion of this Board that the Secretary of State is correct in assuming the Bridge Corporation liable for the 1933 privilege tax due in accordance with Section 4 of Act 85, Public Acts of 1921, as amended; and further in refusing to acknowledge said Bridge Company's exemption of certain capital assets aggregating $8,302,699.54, due to exclusive use in foreign commerce.

We hereby certify to the Secretary of State the following computation of the privilege fee for the year 1933.

[fol. 28] Paid-up capital $1,505,300.00 @ 2½ mills—$3,763.25.

Total privilege fee.

Patrick H. O'Brien, Attorney General, Chairman; John K. Stack, Jr., Auditor General, Theodore I. Fry, State Treasurer.

Dated this 22nd day of November, 1933.

Certificate of Secretary of State

1. Article III of Articles of Association of Detroit International Bridge Co., appearing in original articles, June 21, 1927.

2. Amendment to Article III, filed August 5, 1927.

United States of America

The State of Michigan, Department of State

To all to whom these present shall come:

I, Frank D. Fitzgerald, Secretary of State of the State of Michigan and Custodian of the Great Seal thereof, Do Hereby Certify that the annexed copy of Article III of the articles of association of the Detroit International Bridge Company and Article III of amendment to the articles of association of said company has been compared by me with [fol. 29] the record on file in this Department and that the same is a true copy thereof, and the whole of such record.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol, in the City of Lansing, this Twenty-eighth day of February, A. D. 1934.

Frank D. Fitzgerald, Secretary of State. (Great Seal of the State of Michigan.)

Article III Appearing in Articles of Association of Detroit International Bridge Company—Filed June 21, 1927

Article III

The purpose or purposes of this corporation are as follows:

Constructing, owning and/or operating a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada.

Amendment to Article III of the Articles of Association of the Detroit International Bridge Company, Filed August 5, 1927

Article III

The purpose or purposes of this corporation are as follows:

[fol. 30] To construct, own and/or operate a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada and the approaches thereto.

To maintain and operate such bridge and the approaches thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use.

In furtherance and not in limitation of the general powers conferred by the laws of the State of Michigan and of the objects and purposes hereinbefore stated, it is hereby expressly provided that this corporation shall also have the following powers, that is to say:

To acquire by purchase, exchange, lease or otherwise, and to own, hold, erect, construct, operate, maintain, make, alter, enlarge and improve, and to aid or subscribe to the construction, acquisition or improvement of, convey, mortgage, sell, lease or otherwise dispose of, any and all real and personal property of every kind, corporeal and incorporeal, rights and privileges and any and all interests therein, necessary or incidental to or connected with any of the purposes of the corporation; and to perform any and all such acts either alone or jointly, or jointly and severally, with any other corporation or corporations, association or associations, domestic or foreign, or any firm or individual;

To take over the property, rights and privileges of any person, firm, association or corporation appropriate or required for the purposes of this corporation in whole or in part by purchase thereof or by acquisition of the capital stock of any such corporation or in any other manner; to pay for the same in cash or the stock, bonds, debentures, notes or obligations of this corporation or otherwise; to as-[fol. 31] sume the whole or any part of the contracts, leases or other obligations of such corporation, or to take over such property subject to any such liabilities;

To purchase, redeem or otherwise acquire, and to hold, sell or otherwise dispose of, its own shares of stock (in so far as may be permitted by law) and its bonds, debentures, notes or other evidences of indebtedness;

To borrow money, either alone or jointly, or jointly and severally, with any other corporation or corporations, association or associations, domestic or foreign, or any firm or individual, to make, draw, accept, issue, endorse, negotiate and guarantee promissory notes, bills of exchange, bonds, debentures, warrants and other obligations and evi-

dences of indebtedness, whether secured, by mortgage, pledge or otherwise or unsecured, for money borrowed or in payment for property purchased or acquired or for any other lawful object; to mortgage or pledge any or all of its properties, rights, privileges and interests, including any shares of stock, bonds, debentures, notes or other obligations or evidences, of indebtedness at any time owned or subject to disposition by it, and any such mortgage or pledge may be created by this corporation alone or jointly, or jointly and severally, with any other corporation or corporations, association or associations, domestic or foreign, or any firm or individual;

To acquire by purchase, subscription or otherwise, and to own, hold, use, sell, assign, transfer, mortgage, pledge, exchange or otherwise dispose of shares of stock, bonds, debentures, notes, scrip, securities, obligations, evidences of indebtedness or contracts of any corporation or corpora- [fol. 32] tions, association or associations, domestic or foreign, or any firm or individual or the United States or the Dominion of Canada or any state, territory or colony of the United States or any province of the Dominion of Canada or any other foreign country or any municipality or local authority within or without the United States or the Dominion of Canada, and also to issue in exchange therefor stocks, bonds, debentures, obligations or other evidences of indebtedness of this corporation, and while the owner or holder of any such shares of stock, bonds, debentures, notes, scrip, securities, obligations, evidences of indebtedness or contracts, to receive, collect and dispose of the dividends, interest and income thereon or therefrom, and to possess and exercise in respect thereto all of the rights, powers, and privileges of ownership, including all voting powers thereon;

To guarantee the payment of dividends upon any capital stock, and to become surety in respect of, endorse or otherwise guarantee the principal or interest or both of any bonds, debentures, notes, scrip or other obligations or evidences of indebtedness, or the performance of any contract, lease or obligation, of any corporation or corporations, association or associations, domestic or foreign, or any firm or individual, in which this corporation may have a lawful interest, or any shares of stock of which or any bonds, debentures, notes, obligations, evidences of indebtedness or contracts of which or whom are held by or for this corpor-

ation, or whenever such acts are calculated to promote the welfare of this corporation or to maintain, extend or enlarge its business or to protect its interests, in so far as and to the extent that such action may be permitted by law; [fol. 33] To aid in any manner any corporation or corporations, association or associations, domestic or foreign, or any firm or individual, any shares of which or any bonds, debentures, notes, obligations, evidences of indebtedness or contracts of which or of whom are held by or for or in any manner guaranteed by this corporation or in the welfare of which or of whom this corporation shall have any interest, and to do any acts, designed to protect, preserve, improve or enhance the value of any property at any time held by this corporation or in which it may at any time have an interest.

To do every other act or acts, thing or things incidental or appurtenant to or growing out of or connected with said purposes, objects and powers, provided the same be not inconsistent with the laws under which this corporation is organized.

This corporation may maintain offices or agencies, conduct its business or any part thereof, purchase, lease or otherwise acquire, hold, mortgage, convey and assign real or personal property, and do all or any of the acts herein set forth, outside of the State of Michigan as well as within said State.

[fol. 34] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TO APPEAL—Dec. 19, 1933

In this cause a motion is filed by appellant for an extension of time within which to appeal from an order of the Corporation Tax Appeal Board, and nothing in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, It is ordered that the motion be and the same is hereby granted, and that the [fol. 35] appeal of said appellant from said order of the Corporation Tax Appeal Board be and the same is hereby allowed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 36] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL—Feb. 20, 1934

In this cause an application is filed by appellant for leave to appeal from an order of the Corporation Tax Appeal Board, and a brief in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby granted.

[fols. 37-41] Clerk's certificate to foregoing paper omitted in printing.

[fol. 42] IN SUPREME COURT OF MICHIGAN

DETROIT INTERNATIONAL BRIDGE COMPANY, Appellant,

v.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN, Appellee

Before the Entire Bench

OPINION—Filed June 4, 1934

FEAD, J.:

Plaintiff, a Michigan corporation, appeals from assessment, for 1933, of the fee imposed under C. L. 1929, §§ 10140, 10143, on every corporation organized or doing business under the laws the state—

"for the privilege of exercising its franchise and of transacting its business within this state."

The fee is payable for the privilege of exercising the corporate franchise whether it is exercised or not. In com-

puting the fee, "none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce" enters into the computation.

In a former case, involving the fees for 1929 and 1930, plaintiff was held liable, In re Detroit International Bridge Company, 257 Mich. 52, affirmed in Detroit International Bridge Co. v. Corporation Tax Appeal Board, 287 U. S. 295. The Supreme Court of the United States refused to pass upon the contention that the fee violated the commerce clause of the Federal Constitution because plaintiff had not established that it had no power to carry on any business [fol. 43] not within the protection of the commerce clause.

Thereupon, in 1933, plaintiff amended its charter to read:

"Article III

"The purpose or purposes of this corporation are as follows:

"To operate the highway bridge, known as the Ambassador Bridge, across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge, and approaches and appurtenances thereto.

"To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

Plaintiff now claims that, under its charter, it can do no intrastate business, its only corporate power is to operate the bridge, such operation is foreign commerce and, therefore, the privilege fee is a burden upon such commerce and contravenes the Federal Constitution.

We need not inquire whether plaintiff has any intrastate power under statutes regulating domestic corporations. Nor whether maintenance of the bridge is local business. Nor need the multitude of cases dealing with taxation and regulation of interstate and foreign commerce be analyzed or distinguished. In plaintiff's former case and In re Detroit & Windsor Ferry Company, 232 Mich. 574, where this court held that the fee is not a direct burden on foreign commerce, the fact that the corporations had local

powers was not given weight. These cases are determinative upon plaintiff's liability for the fee.

However, in determining the amount of the fee, the question whether the operation of the bridge is foreign commerce is presented because of the statutory exclusion from the computation of property used exclusively in interstate commerce. In this connection, "interstate commerce" includes foreign commerce. In re Detroit & Windsor Ferry Company, supra.

[fol. 44] There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But the question under the statute is whether it is used in such commerce by plaintiff.

Plaintiff conveys no persons or goods across the bridge or international boundary line. It merely collects tolls from such pedestrians or vehicles as use it. It provides an instrumentality which others may use in conducting foreign business.

Plaintiff cites Covington & Cincinnati Bridge Company v. Kentucky, 154 U. S. 204 as controlling. There, a state law fixing tolls on an interstate bridge was held invalid as a regulation of interstate commerce. The court said, italics ours:

"With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in Gibbons v. Ogden, 9 Wheat. 1, 189, to be 'intercourse,' *and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool.* While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. *A tax laid upon those who do the business of common carriers* upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

It will be noted that the tolls constituted a direct burden upon the people who used the bridge in interstate commerce.

Defendant relies on Henderson Bridge Company v. Kentucky, 166 U. S. 150. This case has particular significance because of a vigorous dissenting opinion by four justices. In both opinions the Covington Bridge case was cited. The state imposed a tax upon the value of the franchise of a domestic corporation operating a railroad bridge. The minority held it was a franchise tax upon all the business of the bridge company and that its business was interstate commerce. They said:

[fol. 45] "The contention that although the traffic over the bridge may be interstate commerce and the receipts from said traffic be interstate commerce receipts, yet the tolls paid to the bridge company are not receipts from interstate commerce business transacted by the bridge company, is a mere distinction without a difference. What, may I again ask, is the toll paid to the company for the use of the bridge but the result of a contract entered into for the purpose of carrying on interstate commerce? In the *Covington Bridge Case* the sole question was as to the right of the State of Kentucky to regulate the amount of tolls to be received by the bridge company. The right of the State was denied on the ground that the tolls were a matter of interstate commerce, that is, that the business of operating the bridge and charging for the use thereof was interstate commerce and not subject to state control. In that case then, the tolls were adjudged to be receipts from interstate commerce; in the case at bar, they are declared not so to be. The far-reaching consequence of this asserted distinction is well calculated to arouse solicitude for the future."

The majority of the court held the tax was upon the franchise as intangible property and was not a burden upon interstate commerce because the bridge company was not engaged in interstate commerce. The reasons given for the ruling are not dicta, as suggested by plaintiff, although the ruling could have been sustained on other grounds. The court said:

"Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the

bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted."

In Arkansas, Etc. Terminal Co. v. State, 174 Ark. 420, certiorari denied 275 U. S. 548, the tax was imposed on a foreign corporation, authorized to do business in Arkansas, for the "right or privilege of doing business in the state." Its sole business was to maintain, own and operate an interstate bridge. It leased the bridge to three interstate carriers which owned all the capital stock of the bridge company and paid as rental for the use of the bridge only such sum as was necessary to take care of maintenance, taxes and other fixed charges. The court held the bridge company, by leasing, maintaining and keeping the bridge and its approaches repaired and employing labor and [fol. 46] capital in the state, was doing business in the state, that maintenance of the bridge was not interstate commerce, and said:

"Appellant's next contention is that, if engaged in business in Arkansas, it is engaged solely in interstate commerce or solely in the maintenance, ownership and operation of an instrumentality of such commerce. According to the stipulation and agreements in this case, the bridge company is not only not engaged in interstate commerce, but it is not engaged in any kind of commerce. It does not operate the bridge and does not carry either passengers or goods. In fact, it does nothing in the way of commerce, either intrastate or interstate. It owns, leases, repairs and maintains the bridge across the Mississippi River, and, while the bridge may be an instrumentality of interstate commerce so far as the carriers are concerned, the bridge company has nothing whatever to do with carrying either freight or passengers, and therefore does not use the bridge as an instrumentality for interstate commerce or any other kind of commerce."

In that case, as usual, the court reasoned from the facts before it. It did not intimate that if the bridge company

had operated the bridge the result would have been different.

In our opinion, the fact that plaintiff carries no persons or goods across the international line is determinative that it is not engaged in foreign commerce and its property is not so used by it. We so read the authorities above cited.

Affirmed.

(Signed) Louis H. Fead. William W. Potter. Nelson Sharpe. Walter H. North. Howard Wiest. George E. Bushnell. E. M. Sharpe. Henry M. Butzel.

[File endorsement omitted.]

[fol. 47] IN SUPREME COURT OF MICHIGAN

No. 37654

In re DETROIT INTERNATIONAL BRIDGE COMPANY, a Corporation Organized and Existing under the Laws of the State of Michigan

JUDGMENT—Filed June 29, 1934

The record and proceedings in this cause having been removed to this Court by appeal allowed by this Court issued to the Corporation Tax Appeal Board for the State of Michigan and the matters in error assigned in said petition for appeal (in the nature of a petition for a writ of certiorari) having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings the imposition of said privilege fee for the year of 1933 under Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, in so far as applied to the plaintiff does not violate Article I, Section 8, Clause 3, of the Constitution of the United States, and it further appearing to the Court that appellant, Detroit International Bridge Company, is not engaged in foreign commerce, and that the determination of the Corporation Tax Appeal Board of the privilege fees for the year 1933 was without error.

Therefore, it is ordered and adjudged that the determination of the Corporation Tax Appeal Board for the State of Michigan of the 1933 privilege tax imposed under Act No.

[fol. 48] 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, be, and the same hereby is, affirmed.

Done at Lansing, Michigan, this 29th day of June, A. D. 1934.

——— ———.

[File endorsement omitted.]

[fol. 49] IN SUPREME COURT OF MICHIGAN

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 29, 1934

To the Honorable Nelson Sharpe, Chief Justice of the Supreme Court for the State of Michigan:

Now comes Detroit International Bridge Company, plaintiff and appellant, and represents:

I

That on the 29th day of June, A. D. 1934, final judgment was duly entered in the above entitled cause by the Supreme Court for the State of Michigan, the highest court of the State of Michigan, affirming in all particulars a determination made by the Corporation Tax Appeal Board of the State of Michigan.

II

This action before the Supreme Court of the State of Michigan is in the nature of a certiorari proceeding to review the determination of the Corporation Tax Appeal Board of the State of Michigan, to which Board the plaintiff and appellant appealed from the computation of the [fol. 50] Secretary of State for the State of Michigan of the annual privilege fees for the year 1933.

III

That the Detroit International Bridge Company, plaintiff and appellant, is a corporation organized and existing under the laws of the State of Michigan, and that under

Article III of its Articles of Incorporation, as amended, the only corporate power with which the corporation was vested is as follows:

"To operate the highway bridge known as the Ambassador Bridge across the Detroit River, from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

"To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

The Detroit International Bridge Company, petitioner and appellant, has continuously since October, 1929, itself operated said bridge for vehicular and pedestrian traffic across the Detroit River from Detroit, Michigan, to Canada, and has engaged exclusively in such business.

IV

In said cause there is drawn in question the validity of a statute of the State of Michigan, on the ground of its being repugnant to the Constitution, laws or treaties of the United States, and the decision is in favor of its validity. Petitioner and appellant contended that the corporation was not subject to the payment of the annual privilege fee under Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of [fol. 51] Michigan because it was limited by the powers granted under its corporate charter to the carrying on of this business of foreign commerce and because it was engaged exclusively in foreign commerce, and to impose this annual privilege tax upon it would be to impose a tax upon it for the privilege of engaging exclusively in foregin commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States. Plaintiff and appellant, Detroit International Bridge Company, claimed and contended that Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan, so far as applied to it, is unconstitutional in that it is an improper interference with and regulation of foreign commerce by the State of Michigan, and

thereby violates the power of Congress, to regulate foreign commerce as provided in Article I, Section 8, Clause 3, of the Constitution of the United States. Plaintiff and appellant further contended and claimed that under said Act No. 175 of the Public Acts of 1929 that its property used exclusively in foreign commerce was exempt and should be excluded from the computation of any tax.

V

Plaintiff's and appellant's claims and contentions, that said Act contravenes Article I, Section 8, Clause 3, of the Constitution of the United States in the respects and particulars aforesaid, and as to the exclusion of property used exclusively in foreign commerce, were overruled by the Supreme Court of the State of Michigan, assignment of errors on these points having been raised in the appeal to the Supreme Court for the State of Michigan; that said question was brought and raised before the Supreme Court of the State of Michigan in the manner and form required under the practice of the said court, and which satisfied [fol. 52] all of the requirements, and the said questions were considered at length by the said Supreme Court for the State of Michigan; and that said contentions and objections of plaintiff and appellant were expressly overruled by the judgment in the opinion rendered in said Supreme Court.

VI

Your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which more fully appear from the assignment of errors which is filed herewith.

Wherefore, petitioner prays for the allowance of an appeal from the Supreme Court for the State of Michigan, the highest court of said State, to the Supreme Court of the United States in order that the decision of the Supreme Court for the State of Michigan may be examined and reversed. It also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court for the State of Michigan, may be sent to the Supreme Court of the United States as provided by law.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated, and more fully set out in the assignment of errors filed herewith.

Alfred A. Cook, Thomas G. Long, Victor W. Klein, Attorneys for Petitioner and Appellant, Detroit International Bridge Company.

This is to acknowledge service of the foregoing petition.
Patrick H. O'Brien, Attorney General, by Alice E. Alexander.

[File endorsement omitted.]

[fol. 53] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Detroit International Bridge Company for an appeal in the above cause to the Supreme Court of the United States from the supreme court of the State of Michigan, and the assignment of errors filed therewith and the record of said cause having been considered, it is

Ordered, that an appeal be, and is, allowed to the Supreme Court of the United States from the supreme court of the State of Michigan, as prayed in said petition, and that the clerk of the supreme court of the State of Michigan shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty (30) days from the date hereof.

It is further ordered that said Detroit International Bridge Company shall give good and sufficient security in the sum of Five Hundred Dollars ($500.00) that said appellant shall prosecute said appeal to effect, and if said appellant fails to make good its plea, it shall answer all costs.

Nelson Sharpe, Chief Justice of the Supreme Court of Michigan.

July 2, 1934.

[fol. 53a] This is to acknowledge service of the foregoing order.

Patrick H. O'Brien, Attorney General, by —— ——,
Its ——.

[fols. 53b & 54] [File endorsement omitted.]

[fols. 55-57] Bond on Appeal for $500.00, approved July 2, 1934, omitted in printing.

[fol. 58] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 29, 1934

Now comes Detroit International Bridge Company, petitioner and plaintiff in error by Alfred A. Cook, Thomas G. Long and Victor W. Klein, its attorneys, and assigns the following errors in the record and proceedings in the said cause, to wit:

I

The Supreme Court of the State of Michigan erred in holding (a) that Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan (Sections 10140, 10143, 10144 and 10145 of the Compiled Laws of Michigan, 1929, inclusive) is constitutional in application to plaintiff and its business, (b) said Act, so far as applied to plaintiff, does not violate Article I, Section 8, Clause 3, of the Constitution of the United States, and (c) in applying said statute and imposing the privilege fee for the year 1933 upon plaintiff, the State of Michigan did not unduly interfere with and thereby usurp or violate the power of Congress of the United States [fol. 59] to regulate such foreign commerce as is provided by Article I, Section 8, Clause 3, of the Constitution of the United States.

II

The tax imposed by Section 4 of said Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act No.

175 of the Public Acts of 1929, of the State of Michigan, not being imposed on the privilege to be a corporation (such tax being imposed by Section 3 of said Act No. 85 of the Public Acts of 1921, as amended by Section 3 of Act No. 175 of the Public Acts of 1929), but being imposed on the privilege to do the business for which organized and such business of the plaintiff being solely and exclusively the maintenance and operation of an instrumentality of foreign commerce, viz., an international highway toll bridge, such privilege (as distinguished from the privilege to be organized as a corporation with power to do such business if permitted by the competent authority) is not grantable by or otherwise within the competency of the State of Michigan, but is solely within the jurisdiction of Congress under Article I, Section 8, Clause 3, of the Constitution of the United States and the Supreme Court of the State of Michigan erred in not holding said Section 4 of said Act not applicable to plaintiff and its business or not valid under said provision of the United States Constitution if so applied.

III

Under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, it is provided that in computing the annual privilege fee imposed upon corporations that property used exclusively in foreign commerce be excluded from the computation of the tax; that even if the [fol. 60] imposition of said tax upon petitioner and plaintiff in error is proper (which we deny), the Supreme Court of the State of Michigan erred in not excluding from the computation of said tax the property of the petitioner and plaintiff in error, which is used exclusively in foreign commerce.

By reason whereof this petitioner and plaintiff in error prays that the final decision and judgment in the Supreme Court of the State of Michigan, dated the — day of June, A. D. 1934, in the above entitled cause be reversed in so far as the 1933 privilege tax be affected thereby, and other appropriate action be had in relation thereto.

Alfred A. Cook, Thomas G. Long, Victor W. Klein,
Attorneys for Petitioner and Appellant, Detroit
International Bridge Company.

Dated June 28th, 1934.

This is to acknowledge service of the foregoing assignments of error.

Patrick H. O'Brien, Attorney General, by Alice E. Alexander.

[fol. 60a] [File endorsement omitted.]

[fol. 61] IN SUPREME COURT OF MICHIGAN

[Title omitted]

STIPULATION DESIGNATING TRANSCRIPT TO BE FORWARDED BY CLERK TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES—Filed June 29, 1934

It is hereby stipulated by and between the parties, through their respective counsel, that the following portion of the record in the above entitled cause be forwarded for filing with the Clerk of the Supreme Court of the United States at Washington, D. C.:

1. The entire record before the Supreme Court of Michigan in the appeal from the Corporation Tax Appeal Board to the Supreme Court of Michigan.
2. The petition for leave to appeal to the United States of America, Supreme Court.
3. Assignments of Error.
4. Order allowing appeal to the United States Supreme Court.
5. Cost Bond.
6. Stipulation designating record to be filed with the United States Supreme Court.

Alfred A. Cook, Thomas G. Long, Victor W. Klein, Attorneys for Detroit International Bridge Company, Plaintiff in Error. Alice E. Alexander, Attorney General, Attorney for Corporation Tax Appeal Board.

Dated June 29, A. D. 1934.

[fol. 61a] [File endorsement omitted.]

[fol. 62] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 63] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS INTENDED TO BE RELIED UPON BY APPELLANT AND PARTS OF RECORD TO BE PRINTED PURSUANT TO RULE 13, SECTION 9, UNITED STATES SUPREME COURT RULES, TOGETHER WITH PROOF OF SERVICE OF SAME—Filed Aug. 15, 1934

Detroit International Bridge Company, a Michigan corporation, appellant, in pursuance to Rule 13, Section 9, Supreme Court Rules, does hereby state that in the appeal it intends to rely upon the following points of law set forth in its three Assignments of Error, to wit:

I

The Supreme Court of the State of Michigan erred in holding (a) that Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan (Sections 10140, 10143, 10144 and 10145 of the Compiled Laws of Michigan, 1929, inclusive) is constitutional in application to plaintiff and its business, (b) said Act, so far as applied to plaintiff, does not violate Article I, Section 8, Clause 3, of the Constitution of the United States, and (c) in applying said statute and imposing the [fol. 64] privilege fee for the year 1933 upon plaintiff, the State of Michigan did not unduly interfere with and thereby usurp or violate the power of Congress of the United States to regulate such foreign commerce as is provided by Article I, Section 8, Clause 3, of the Constitution of the United States.

II

The tax imposed by Section 4 of said Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, not being imposed on the privilege to be a corporation (such tax being imposed by Section 3 of said Act No. 85 of the Public Acts of 1921, as amended by Section 3 of Act No. 175 of the Public Acts of 1929), but being imposed on the privilege to do the business for which organized and such business of the plaintiff being solely and exclusively the maintenance and operation of an instrumentality of foreign commerce, viz., an international highway toll bridge, such privilege (as

distinguished from the privilege to be organized as a corporation with power to do such business if permitted by the competent authority) is not grantable by or otherwise within the competency of the State of Michigan, but is solely within the jurisdiction of Congress under Article I, Section 8, Clause 3, of the Constitution of the United States and the Supreme Court of the State of Michigan erred in not holding said Section 4 of said Act not applicable to plaintiff and its business or not valid under said provision of the United States Constitution if so applied.

III

Under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts [fol. 65] of 1929, of the State of Michigan, it is provided that in computing the annual privilege fee imposed upon corporations that property used exclusively in foreign commerce be excluded from the computation of the tax; that even if the imposition of said tax upon petitioner and plaintiff in error is proper (which we deny), the Supreme Court of the State of Michigan erred in not excluding from the computation of said tax the property of the petitioner and plaintiff in error, which is used exclusively in foreign commerce.

Appellant further states that it intends to rely upon the following portions of the record, which it thinks necessary for consideration in the determination of this case on appeal:

1. The entire record before the Supreme Court of the State of Michigan in the appeal from the Corporation Tax Appeal Board to the Supreme Court of Michigan.
2. Judgment of Supreme Court of Michigan.
3. The petition of the Detroit International Bridge Company filed with the Supreme Court of Michigan for leave to appeal to the United States Supreme Court.
4. Assignments of error.
5. Order allowing appeal to the United States Supreme Court.
6. Cost Bond.
7. Stipulation filed with the Supreme Court of Michigan designating transcript to be forwarded by clerk to the Clerk of the Supreme Court of the United States.

8. This statement of points intended to be relied upon [fol. 66] and designation of the parts of the record to be printed.

Alfred A. Cook, Thomas G. Long, Victor W. Klein, Attorneys for Appellant, Detroit International Bridge Company.

Proof of Service Upon Appellee

STATE OF MICHIGAN,
County of Wayne, ss:

Victor W. Klein, being first duly sworn, deposes and says that he did on the 10th day of August, A. D. 1934, serve a true copy of the foregoing Designation of points intended to be relied upon by appellant and parts of record to be printed pursuant to Rule 13, Section 9, United States Supreme Court Rules, together with Proof of Service of same upon the Corporation Tax Appeal Board by enclosing same in an envelope addressed to each of the following: Patrick H. O'Brien, Attorney General, Lansing, Michigan, a member of the Corporation Tax Appeal Board, and Alice E. Alexander, Secretary of State's Office, Lansing, Michigan, of counsel for the appellee, registered mail, return receipt requested, and depositing said envelopes in the Post Office of the City of Detroit, Wayne County, Michigan, postage prepaid

Further deponent saith not.

Victor W. Klein.

Subscribed and sworn to before me this 10th day of August, 1934. Veronica B. Walker, Notary Public, Wayne County, Michigan. My commission expires Dec. 8, 1936.

[fol. 67] [File endorsement omitted.]

Endorsed on cover: File No. 38,900. Michigan Supreme Court. Term No. 272. Detroit International Bridge Company, Appellant, vs. Corporation Tax Appeal Board of the State of Michigan. Filed August 8, 1934. File No. 272, O. T., 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
A MICHIGAN CORPORATION,

Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

MOTION FOR LEAVE TO FILE STATEMENT OF JURISDICTION.

To the Honorable the Judges of the Supreme Court of the United States:

Now comes the Detroit International Bridge Company, appellant in the above entitled cause, and moves the Court for leave to file statement as to the jurisdiction, as required by Rule 12, Paragraph 1 of the United States Supreme Court rules.

Jurisdictional basis and grounds for appeal were set forth by the appellant, Detroit International Bridge Company, in its petition for appeal to the Supreme Court of the United States, as filed with the Chief Justice of the Supreme Court of Michigan. It was the opinion of counsel

for the appellant that this statement of jurisdiction as contained in the petition for appeal sufficiently complied with Rule 12, Paragraph 1 of the United States Supreme Court rules, and that a separate statement of jurisdiction was not necessary. Chief Justice of the Supreme Court of Michigan apparently concurred in this opinion of counsel and the order of appeal was granted.

The Supreme Court of Michigan, in its opinion (267 Michigan—case not yet printed in advance sheets), discussed the Federal constitutional question, that is, whether the annual privilege tax as imposed upon appellant contravened the Commerce Clause of the Federal Constitution. There is clearly and undisputably a Federal question involved.

The clerk of the United States Supreme Court suggested that a separate statement of jurisdiction be filed and that appellant file this, its motion for leave to file such statement of jurisdiction.

ALFRED A. COOK,
THOMAS G. LONG,
VICTOR W. KLEIN,
Attorneys for Appellant,
Detroit International Bridge Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
A MICHIGAN CORPORATION,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

STATEMENT OF DETROIT INTERNATIONAL BRIDGE COMPANY, APPELLANT, SETTING FORTH THE BASIS ON WHICH THE REVIEW OF THE JUDGMENT OF THE SUPREME COURT OF MICHIGAN IS INVOKED ON APPEAL.

This is an appeal from the judgment entered by the Supreme Court of the State of Michigan, the court of highest jurisdiction in the State of Michigan, entered on July 2, 1934. The application of the Detroit International Bridge Company, the appellant, for leave to appeal to the United States Supreme Court was also filed on July 2, 1934, after the entry of the judgment. The order allowing the appeal was signed and entered by the Chief Justice of the Supreme Court of the State of Michigan on July 2, 1934.

It is the contention of the Detroit International Bridge Company that the United States Supreme Court has jurisdiction to review on appeal the judgment entered by the Supreme Court of the State of Michigan on July 2, 1934, under the provisions of the Judicial Code, Section 237, United States Code Annotated, Title 28, Section 344.

The validity of the Michigan statute in question which Detroit International Bridge Company, appellant, contends impugns Article I, Section 8, Clause 3 of the Constitution of the United States, is Act No. 85 of the Public Acts of 1921 as amended by Act No. 175 of the Public Acts of 1929, a pertinent section of which reads as follows:

> "SEC. 4. Privilege fee, Basis of. Every corporation organized or doing business under the laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

The appellant, Detroit International Bridge Company, was duly incorporated in 1927 under the laws of the State of Michigan, and at that time paid the Secretary of State for the State of Michigan the franchise or organization fee

for the privilege of *being* a corporation under Act No. 85 of the Public Acts of 1921, Secs. 3 and 3A, as amended by Act No. 33 of the Public Acts of 1927. Distinguished from this organization or franchise fee which is paid for the privilege of bringing into being, for the privilege of being or continuing to exist or to be a corporation, Michigan also imposes an annual privilege fee upon corporations, being Sections 4 and 5 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, Sections 4 and 5. As will be pointed out hereinafter, this annual privilege fee is imposed upon domestic and foreign corporations for the privilege of exercising corporate franchises within the State, and for the privilege of doing business in Michigan.

After the Detroit International Bridge Company, the appellant, had commenced to operate this international bridge it contended that it was not subject to the payment of the annual privilege fee for the privilege of doing business in Michigan, because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

This question was raised by the appellant in an appeal involving the constitutionality of the same statute for the year of 1930, *In re Detroit International Bridge Company*, 257 Mich. 52, and an appeal was taken from the Supreme Court of Michigan to the Supreme Court of the United States, *Detroit International Bridge Company* v. *Corporation Tax Appeal Board of Michigan*, 287 U. S. 295. In the appeal to the Supreme Court of the United States counsel for the Corporation Tax Appeal Board contended that

under Article III of the Articles of Association as amended on August 5, 1927, the appellant had the power to engage in business other than the operation of the bridge. The Bridge Company claimed that these other powers were merely incidental to the main purpose of operating this international highway bridge. The United States Supreme Court at page 297 in its decision did not pass upon the constitutionality of the Act, but said:

> "We do not consider whether appellant is engaged in foreign commerce for we are of opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause."

Thereupon, although appellant had been of the opinion that the additional provisions in the amendment to Article III of the Articles of Association of August 5, 1927, were merely incidental to the primary power, nevertheless it did cause said Article III to be amended on May 3, 1933, so as to read as follows:

> "Article III.
>
> "The purpose or purposes of this corporation are as follows:
>
> "To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.
>
> "To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

This in substance, is similar to Article III that appeared in the original Articles of Association.

On August 30, 1933, the Detroit International Bridge Company filed its annual report for the year 1933, as is required by Section 82 of Act No. 327 of the Public Acts of 1931, and enclosed therewith its check for $2.00 to cover its filing fee, setting forth in its letter to the Secretary of State that the Articles of Association had been amended on May 3, 1933, as is hereinabove set forth, and that it was now indisputable that the only power the corporation had was to engage in the carrying on of foreign commerce and that it had no power whatsoever under its Articles of Association to do a local business. The appellant, Detroit International Bridge Company, further stated:

> "It is, therefore, the position of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States."

The Secretary of State on October 26, 1933, held that the appellant was subject to the tax and also that items 5 and 8, consisting of the bridge structure, were not used exclusively in foreign commerce so as to be exempt from the tax, and determined the tax as being thirty-seven hundred sixty-five and 25/100 dollars ($3,765.25), from which determination appellant filed an appeal to the Corporation Tax Appeal Board on November 3, 1933. The Corporation Tax Appeal Board on November 21, 1933, made a like determination.

This case was thereupon appealed to the Supreme Court of the State of Michigan (in a proceeding in the nature of a certiorari proceeding) to review the determination of the Corporation Tax Appeal Board of the State of Michigan. The obligation of the appellant to pay the privilege tax for the year 1933 is before this Court on appeal.

The Detroit International Bridge Company, the appellant, contended that the corporation was not subject to the payment of the annual privilege fee under Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan, because that statute imposed an annual tax upon corporations for the privilege of *doing* business (as distinguished from the privilege of *being* or continuing to exist *or to* be a corporation); because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

The nature of Act No. 85 of the Public Acts of 1921, of the State of Michigan, the tax statute here in question, has been carefully analyzed and defined by the Supreme Court of Michigan in a case in which the validity of the statute was attacked as being repugnant to certain provisions of the Constitution of the State of Michigan. The Supreme Court of Michigan, in that case, *Union Steam Pump Sales Company* v. *Secretary of State of Michigan*, 216 Mich. 261, held "that it is not a property tax, but is a tax on the franchise to do business as a corporation within the state".

Distinguishing the franchise "to be" a corporation from the franchise of doing business as a corporation, the Michi-

gan Supreme Court, after quoting at length from numerous authorities and text writers, summarized, page 272, saying:

> "These authorities demonstrate beyond cavil that there is a distinction and a well recognized one between the franchise to be a corporation and the franchise to do business as a corporation. *One is the franchise 'to be', the other the franchise 'to do'.* One belongs to the corporators, the other to the corporation. * * * The franchise 'to do' (belonging to the corporation) may follow the franchise 'to be' (belonging to the corporators). But each is a different franchise as the authorities above cited demonstrate and the taxation of one is not the taxation of the other, the sources of revenue are not the same, the subjects of taxation are not the same."

It was concluded by the Court, at page 268, that "The law here under consideration levies a specific tax upon the right, the franchise *to do* business as a corporation."

It was necessary for the Michigan Supreme Court in the *Union Steam Pump Sales Company* case to carefully distinguish between the two different corporate franchise taxes in that the proceeds of the tax were payable to the school fund under the State Constitution if the tax were upon the privilege *to be* a corporation, whereas payments under Act No. 85 of the Public Acts of 1921, here in question, were to be credited to the general fund, and the validity of the act could only be sustained if this was a tax imposed for the privilege of *doing* business as a corporation.

The Detroit International Bridge Company, the appellant, had, upon its organization, paid the organization fee to the State of Michigan for the privilege of *being* a corporation and once this privilege fee is paid upon organization there is no provision under the Michigan laws under which a further tax for this privilege of *being* is imposed. The annual privilege fee, Act No. 85 of the Public Acts of

1921, as amended, on the other hand, as has been determined by the Michigan Supreme Court and as is apparent from the language of the statute, is for the privilege of *doing* business as a corporation. It is for the privilege of doing business for which this tax is imposed upon corporations.

The Detroit International Bridge Company, the appellant, claimed and contended that Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan, so far as applied to it, is unconstitutional in that the Act attempted to impose a tax upon it for the privilege of doing business when the only business it did and could do as a corporation under its charter was to engage exclusively in foreign commerce, and that to uphold the validity of the Act as applied to it would be an improper interference with and regulation of foreign commerce by the State of Michigan, and thereby violates the power of Congress, to regulate foreign commerce as provided in Article I, Section 8, Clause 3 of the Constitution of the United States.

These questions were raised in the appeal to the Supreme Court of the State of Michigan in the manner and form required under the practice of said court, and said questions were considered at length by said Supreme Court of the State of Michigan. The contentions of the appellant that the application of the statute as made by the Secretary of State and as applied to it was in violation of the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States were expressly overruled by the judgment and the opinion rendered by said Supreme Court of the State of Michigan (see opinion filed June 4, 1934).

It is the contention of the appellant, Detroit International Bridge Company, that this Court has jurisdiction of this appeal under the provisions of the Judicial Code, Section 237, United States Code Annotated, Title 28, Section 344, that

in the final judgment of the Supreme Court of the State of Michigan, which is the highest court of that state, there has been drawn in question the validity of a statute of the State of Michigan on the ground that it is repugnant to the Constitution of the United States and because the decision of the Supreme Court of Michigan is in favor of the validity of said statute. See *General Oil Company* v. *Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754; *Atlantic Coast Line Railroad Co.* v. *Wharton*, 207 U. S 328, 28 Sup. Ct. 121, 52 L. Ed. 230.

Respectfully submitted,

ALFRED A. COOK,
THOMAS G. LONG,
VICTOR W. KLEIN,
Attorneys for Appellant,
Detroit International Bridge Company.

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IN THE

Supreme Court of the United States

October Term 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
a Michigan corporation,

Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

SUPPLEMENTAL MEMORANDUM BRIEF IN SUPPORT OF STATEMENT AS TO JURISDICTION

Counsel for Appellee, Corporation Tax Appeal Board of Michigan, filed a statement opposing the jurisdiction, asserting that appellant is not engaged in foreign commerce by operating an international highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, and therefore the annual tax for the privilege of engaging in the business of operating this international highway bridge is not imposed for the privilege of engaging in foreign commerce. Counsel mainly rely upon the cases of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, and *Arkansas and Memphis Railway Bridge and Terminal*

Company v. State, 295 S. W. 378. These cases are both distinguishable from the case at bar.

It is the contention of the appellant that under its corporate charter it has only the power to own, operate and maintain this international highway bridge; that it has engaged in and can engage in no other business, and that this business is that of foreign commerce, so that the imposition of an annual privilege fee for the privilege of doing this business, which is the only business in which appellant can engage, is to impose a tax upon it for the privilege of engaging in foreign commerce, in contravention of the Commerce Clause of the Constitution of the United States.

The case of *Covington & Cincinnati Bridge Co. v. Kentucky,* 154 U. S. 204, is here controlling. In that case the Covington & Cincinnati Bridge Company was organized under the laws of both Ohio and Kentucky, and built and itself operated (as does the Detroit International Bridge Company) a bridge spanning the Ohio River, charging toll for vehicular and pedestrian traffic crossing over this structure. Kentucky enacted certain laws in reference to the toll rate and operation of the bridge, which the Bridge Company in that case contended was in violation of the Commerce Clause of the Federal Constitution. According to Mr. Justice Brown of the United States Supreme Court, at page 217, there were two questions which had to be decided, being:—

> "First, whether such traffic across the river is interstate commerce; and second, whether *a bridge can be considered an instrument of such commerce.*
>
> The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196, in which the

State of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and inasmuch as it appeared that the ferry boats were registered in New Jersey and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that State.

* * * With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax is laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

Counsel for the Tax Appeal Board, the appellee, rely on the case of *Henderson Bridge Company v. Kentucky*, 166 U. S. 150, and *Arkansas & Memphis Ry. Bridge & Terminals Co. v. State*, 174 Ark. 420, 295 S. W. 378 (certiorari having been denied by the Supreme Court, 275 U. S. 548), in support of their contention that the appellant is not engaged in foreign commerce. Both of these cases are readily distinguishable from the case at bar.

In the *Henderson Bridge* case the Bridge Company maintained and operated a bridge structure across the Ohio River from Kentucky to Indiana. The Bridge Company was a corporation organized under the laws of Kentucky. The Bridge Company rented out the use of this railroad bridge to various railroad companies. The State of Kentucky, under the general tax laws, levied a tax upon the Bridge Company covering both its tangible and intangible property. Included in the assessment for intangible property was the franchise granted by the State of Kentucky to the incorporators for the privilege of being a Kentucky corporation, and the tax board there fixed a value of that franchise as an intangible asset of the corportion subject to taxation. The Bridge Company contended that the tax was a franchise tax or a privilege tax for the privilege of engaging in this interstate business, and being a tax upon the privilege of doing business violated the Commerce Clause of the United States. The court by a majority opinion, four of the Justices joining in a vigorous dissent, decided as appears on pg. 154 of the opinion:

> "The tax in controversy was nothing more than a tax on the intangible property of the Company in Kentucky."

The majority treated the tax as a direct personal property tax, including this franchise as an intangible asset. Clearly even though the bridge were engaged in interstate commerce, it was then and is now well decided that a direct property tax may be imposed by a sovereignty upon corporate assets located within that sovereignty, even though those assets are used exclusively in interstate commerce. *St. Louis & East St. Louis Ry Co. v. State of Missouri*, 256 U. S. 314; *United States Express Company v. Minnesota*, 223 U. S. 335; *Fargo v. Hart*, 193 U. S. 490; *Postal Telegraph & Cable Co. v. Charleston*, 153 U. S. 692, 700. The statement of the court on page 153, that the tax was not a tax on interstate commerce carried on by means of the bridge because the bridge did not transact such business, was unnecessary to that decision and is not now binding upon the court. Treating the tax as a direct property tax as distinguished from the tax for the privilege of doing business within the state as a corporation like the tax in the case at bar, the decision of the Supreme Court in the *Henderson* case would necessarily have been the same regardless of whether the Bridge Company were engaged in interstate commerce or not.

Four of the Justices joining in the dissenting opinion of the minority in the *Henderson* case differed from the majority of the court in determining the nature of the Kentucky tax, as well as on the question of whether or not the Bridge Company was engaged in interstate commerce. The minority of the court treated the Kentucky tax as a pure franchise or privilege tax, as distinguished from a direct property tax and submitted that in its opinion that this tax being imposed upon the privilege of doing the business in question and was unconstitutional as being a direct imposition of a tax for the privilege of doing interstate business.

The majority of the court in the *Henderson* case did not, by its opinion, consider that *Covington & Cincinnati Bridge Company* case overruled. On page 153 the court said:

> "The regulation of tolls for transportation over the bridge considered in *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, presented an entirely different question."

The *Covington* case is applicable to the case at bar. A regulation of tolls is a regulation of the doing of business over the bridge. In the case at bar an imposition of a privilege fee for the privilege of doing business, when the only business of the company is operating an international highway bridge of this character, is a regulation of foreign commerce. On the other hand, as has been pointed out hereinbefore, property of a corporation located within a state, though used in interstate commerce, may be subject to a direct property tax. Following this rule, the majority of the court in the *Henderson* case, treating the tax as a direct property tax on a portion of property (the value of the franchise) said to be located in the taxing state of Kentucky, held the tax not to be a burden upon interstate commerce. If the tax in the *Henderson* case were a privilege tax, as the minority of the court held it to be, then it would be imposed for the privilege of doing the interstate business and would be unconstitutional, just as the tax in the case at bar is unconstitutional.

The *Arkansas* case can be distinguished because there the Bridge Company did not itself operate the bridge, but leased the structure to other persons, who in turn operated the structure. As the court in the *Arkansas* case, said referring to the appellant, said, at page 425:

> *"It does not operate the bridge and does not carry either passengers or goods, in fact it does nothing*

in the way of commerce, either intrastate or interstate. It owns, leases, repairs and maintains the bridge across the Mississippi river, and, while the bridge may be an instrumentality of interstate commerce so far as the carriers are concerned, the bridge company has nothing whatever to do with carrying either freight or passengers and therefore does not use the bridge as an instrumentality for interstate commerce or any other kind of commerce."

And further at page 426:

"As we have said, the bridge company merely owns the bridge, *leases* it and maintains it. If a company owned a boat or a number of boats, and leased them to a carrier or to any person or corporation who used the boat in carrying persons or freight in interstate commerce, the boat would be used in interstate commerce, the carrier would be engaged in interstate commerce, but the owner of the boat would have no connection whatever with interstate commerce. And we therefore think that the bridge company in this case is not engaged in interstate commerce, and it is not engaged in the operation of an instrumentality used in interstate commerce."

In the case at bar, unlike the *Arkansas* case, the Detroit International Bridge Company itself operates the bridge over which people are transported from one country to another. The bridge is an instrumentality of foreign commerce and in operating the bridge, the appellant is engaged in the business of foreign commerce.

Counsel for the Corporation Tax Appeal Board cannot be sustained in their contention that the appellant is not engaged in foreign commerce.

It has been held that one engaged in maintaining in proper condition a bridge used as in instrumentality of interstate commerce is engaged in interstate commerce. In the case of *Pederson v. Delaware, Lackawanna & Western Rd. Co.*, 229 U. S. 146, one carrying materials to be used in repairing a bridge over which interstate trains moved was held to be engaged in interstate commerce, Mr. Justice Van Devanter, delivering the opinion of the court, there said among other things, at pg. 151:

> "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. * * * The work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

One engaged in cooking meals, making beds, etc., for a gang of bridge carpenters in a camp car which was provided and moved from place to place along the railroad line to facilitate their work in repairing bridges over which interstate trains moved was held to be engaged in interstate commerce. *Philadelphia, Baltimore & Washington Railroad Company v. Smith*, 250 U. S. 101. The court said, at pg. 103:—

> "Taking it to be settled by the decision of this court in *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152 that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it."

In *Kinzell v. Chicago, Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, it was held that one engaged in connection with the construction of a fill to replace a trestle (bridge) over which interstate trains moved was engaged in interstate commerce.

The United States Supreme Court has gone so far to hold that *ownership only* of a railroad *wholly within one state leased* to a railroad company doing interstate business and having exclusive possession and control for a yearly money rental would subject the lessor owner to liability as being engaged in interstate commerce, where an injury was sustained by an employee in the course of movement by the lessee railroad of a train of wholly empty cars. *North Carolina Railroad Company v. Zachary*, 232 U. S. 248.

In *State v. Bates & Rogers Construction Company*, 91 Wash. 183, 157 Pac. 483, employes of an *independent contractor* constructing piers under and for the support of a bridge on the line of the Spokane International Railroad Company over which interstate and foreign traffic moved were held to be engaged in interstate and foreign commerce.

In the case at bar it is impossible to use the bridge in other than foreign commerce. From the very inception of its construction it has been exclusively an instrumentality of foreign commerce—physically incapable of any other use.

A company owning and operating ferry boats carrying passengers from one state to another or from this country to another has been held to be engaged in the business of interstate and foreign commerce. *Glouster Ferry Co. v. Pennsylvania,* 114 U. S. 196; *City of Sault Ste. Marie v. International Transit Co.,* 234 U. S. 333; *Mayor of Vadalia v. McNeeley,* 274 U. S. 676.

A company owning and operating a pipe line for gas or oil from one state to or through another state has been held by this court on several occasions to be engaged in the business of interstate commerce. *Ozark Pipe Line Corporation v. Monier, the State Tax Commission of Missouri,* 266 U. S. 555; *Eureka Pipe Line Co. v. Hallanan,* 257 U. S. 265; *United Fuel & Gas Co. v. Hallanan,* 257 U. S. 277.

To hold that the spanning of a stream by ferry boats from the shore of one state to that of another, or the spanning of distances by pipe lines through which gas or oil flows is interstate commerce, and on the other hand to contend, as does the Corporation Tax Appeal Board, that the spanning of the distance by a bridge over a navigable stream over which vehicles and pedestrians travel from the shore of one state to that of another state or country is not interstate or foreign commerce is to raise a fine distinction with no essential difference. The position is inconsistent and unsupportable.

The Detroit International Bridge Company, the appellant, transports passengers and vehicles over this struc-

ture as much as a ferry company, by its boats, transports its passengers, or as much as a pipe line company transports oil or gas. If the bridge were a swing or draw bridge actually moving and lifting the passengers and vehicles from one shore to another, that contention could not be raised. To hold that a swinging or draw bridge would thereby constitute the appellant's business as that of foreign commerce, and a stationary bridge, such as the one here involved, would not be foreign commerce, merely emphasizes the fine hairpoint distinction counsel for the appellee attempt to make. As has been pointed out hereinabove, this court has ruled out any attempt to distinguish a bridge from a ferry boat on the ground that one is movable and the other is a fixture in the *Covington Bridge Company* case, *supra*.

The United States Supreme Court has held that the Federal government may itself construct a bridge across a stream from one state to another as a means of linking up an interstate highway under the powers to regulate interstate and foreign commerce. In the case of *Luxton v. North River Bridge Co.*, 153 U. S. 525, 530, the court said:

> "From these premises, the conclusion appears to be inevitable, that although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."

This same rule was announced in the case of *California v. Central Pacific Ry. Co.*, 127 U. S. 1, 36; *Latinette v. City of St. Louis*, 201 Fed. 676; *Stockton v. Baltimore New York Ry. Co.*, 32 Fed. 9. If the ownership, operation and maintenance of a bridge from one state to another or from one country to another was not engaging in interstate or foreign commerce, then clearly the Federal government would have no power under the Commerce Clause of the Constitution to authorize a Federal corporation to construct such a bridge.

The Detroit International Bridge Company, the appellant, owning, operating and maintaining this highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, must be held to be engaged in foreign commerce.

It is respectfully submitted that the annual privilege tax of the State of Michigan seeks to impose upon the appellant a tax for the privilege of engaging in foreign commerce. Counsel for appellee contend that the annual privilege fee is imposed not for the business transacted or about to be transacted, but for the existence of the right to transact the business in question. Appellant under its corporate charter has only the right to engage in the business of owning, operating and maintaining this international highway bridge and no other business, and, therefore, it has only the right as a corporation to engage in the business of foreign commerce. To impose a privilege tax upon appellant for the privilege of engaging in this business (to wit, owning, operating and maintaining an international highway bridge) when that is the only business in which appellant engages and it is the only business which appellant has the right to engage in under the powers granted by its charter, is to impose a privilege tax upon the privilege of engaging in foreign commerce in violation of the Commerce Clause of the Constitution of the United States.

We respectfully submit that there is a substantial and important Federal question involved in this appeal.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

Appeal from the Supreme Court of the State of Michigan.

BRIEF FOR DETROIT INTERNATIONAL BRIDGE COMPANY

OPINION BELOW

The opinion of the lower court—the Supreme Court of the State of Michigan (R. 23-28)—is reported in 267 Mich. 384, 255 N. W. 368. (See opinion in earlier case, 257 Mich. 52, 240 N. W. 68, 287 U. S. 295.)

JURISDICTION

A statement of the Detroit International Bridge Company, appellant, setting forth the basis on which the review of the judgment of the Supreme Court of Michi-

gan is here invoked on appeal has been heretofore filed with this Court in this cause in compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, and probable jurisdiction has been noted by the Court.

STATEMENT

The Detroit International Bridge Company, the appellant, is a corporation organized under the laws of the State of Michigan, with its principal office at Detroit, Wayne County, Michigan. The purpose and power of this corporation was to construct, and upon completion of the construction, to operate, a bridge for vehicular and pedestrian traffic across the Detroit River, a navigable stream, from Detroit, Michigan, to Sandwich, Ontario, Canada.

The original provisions of Article III appearing in the Articles of Association of the Detroit International Bridge Company as filed at the time of incorporation on June 21st, 1927, limited its power solely to the following purpose (R. 19):

> "ARTICLE III.
>
> The purpose or purposes of this corporation are as follows:
>
> Constructing, owning and/or operating a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada."

Later, on August 5th, 1927, Article III of the Articles of Association of the Detroit International Bridge Company was amended so as to expressly provide for the acquisition and maintenance of real estate and other

powers which it believed were purely incidental powers of any corporation, neither limiting nor extending the general and primary corporate purpose of owning, operating and maintaining this international highway bridge (R. 19-22).

Permission and authority for the construction of the American portion of this bridge was granted by an Act of Congress, approved March 4th, 1921, and amended subsequently by several later Acts of Congress. Permission and authority for the construction of the Canadian portion of the bridge was granted to the Canadian Transit Company, a subsidiary of Detroit International Bridge Company, which owns the Canadian portion of the bridge, by an Act of Parliament of the Dominion of Canada finally approved by the Governor General of Canada on March 31st, 1927.

The appellant, Detroit International Bridge Company, the American company, owns the bridge structure up to the middle of the Detroit River. The Canadian Transit Company owns the other portion of the bridge structure from Canada to the center of the river. All of the stock of the Canadian Transit Company, the subsidiary company, is owned by the American company, the Detroit International Bridge Company, the appellant. The Canadian Transit Company leased the Canadian portion of the bridge to the parent company, the Detroit International Bridge Company, and the appellant, the Detroit International Bridge Company operates the entire bridge, including the Canadian portion of the structure as one operating unit from Detroit to Canada and from Canada to Detroit, having the obligation to maintain and keep in repair the entire bridge structure.

Upon the completion of the construction of this bridge in October, 1929, and continuously thereafter, the De-

troit International Bridge Company, appellant, has itself, through its own officers and employees, operated this bridge, charging vehicular and pedestrian traffic a toll as approved by the War Department. Limited by its corporate powers and purpose the Bridge Company has engaged exclusively in the carrying on of this business since October, 1929, and in no other.

Upon incorporation in 1927, the Detroit International Bridge Company paid the Secretary of State for the State of Michigan the franchise or organization fee for the privilege of *being* a corporation under Act No. 85 of the Public Acts of 1921, Secs. 3 and 3A, as amended by Act No. 33 of the Public Acts of 1927. This organization or franchise fee was paid for the privilege of bringing into being, for the privilege of being or continuing to exist or to be a corporation. Distinguished from this organization or franchise tax, Michigan also imposes an annual privilege fee upon corporations under Sections 4 and 5 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, Sections 4 and 5. As will be pointed out hereinafter, this annual privilege fee is imposed upon domestic and foreign corporations for the privilege of exercising corporate franchises, and for the privilege of doing business in Michigan.

After the Detroit International Bridge Company, the appellant, had commenced to operate this international bridge it contended that it was not subject to the payment of the annual privilege fee for the privilege of doing business in Michigan, because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would

be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

This question was raised by the appellant in an appeal involving the constitutionality of the same statute for the year of 1930, In *Re Detroit International Bridge Company,* 257 Mich. 52, and an appeal was taken from the Supreme Court of Michigan to the Supreme Court of the United States, *Detroit International Bridge Company v. Corporation Tax Appeal Board of Michigan,* 287 U. S. 295. In the appeal to the Supreme Court of the United States counsel for the Corporation Tax Appeal Board contended that under Article III of the Articles of Association as amended on August 5th, 1927, (R. 19-22) the appellant had the power to engage in business other than the operation of the bridge and that these powers were local in nature. The Bridge Company claimed that these other powers were merely incidental to the main purpose of operating this international highway bridge and neither enlarged nor limited its primary purpose and power. The United States Supreme Court at page 297 in its decision did not pass upon the constitutionality of the Act, but said:—

> "We do not consider whether appellant is engaged in foreign commerce for we are of opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause."

Thereupon, although appellant had been of the opinion that the additional provisions in the amendment to Article III of the Articles of Association of August 5th, 1927, were merely incidental to the primary power, it never-

theless caused said Article III to be amended on May 3rd, 1933, so as to read as follows (R. 7):

"ARTICLE III.

The purpose or purposes of this corporation are as follows:

To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

This, in substance, is similar to Article III that appeared in the original Articles of Association (R. 19). The Corporation has no other power or purpose whatsoever.

On August 30th, 1933, the Detroit International Bridge Company filed its annual report for the year 1933 as is required by Section 82 of Act No. 327 of the Public Acts of 1931, and enclosed therewith its check for $2.00 to cover its filing fee, setting forth in its letter to the Secretary of State that the Articles of Association had been amended on May 3rd, 1933, as is hereinabove set forth, and that it was now indisputable that the only power the corporation had was to engage in the carrying on of foreign commerce and that it had no power whatsoever under its Articles of Association to do a local business. The appellant, Detroit International Bridge Company, further stated:

"It is, therefore, the position of the Detroit International Bridge Company that it is not subject

> to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States'' (R. 12 and 13).

In the 1933 annual report filed, the bridge structure was designated as used exclusively in interstate or foreign commerce (R. 8-12, at 12).

The Secretary of State on October 26th, 1933, held that appellant was subject to the full tax, and further stated that the amendment to the Articles of Association which limited the corporate powers substantially as they appeared in the original Articles of Association did not affect the 1933 annual report since the report showed the statement of conditions as of December 1st, 1932, and the amendment was adopted in May of 1933 (R. 14). Counsel for the appellant, Detroit International Bridge Company, thereupon advised the Secretary of State that under the ruling of *In Re Johnston-Newton* Co., 226 Mich. 40, that the privilege tax for the year 1933 was for the period from September 1st, 1933, to August 31st, 1934, and that the reference to the December 31st, 1932, condition was only as to the financial condition upon which the annual fee could be computed, but that it had no reference whatsoever as to the powers with which the Corporation was vested, and it had no bearing upon the privilege for which the fee was being paid (R. 14, 15). It was admitted by the Secretary of State that the reference back to December 31st, 1932, only pertained to the financial condition

upon which the tax was computed, and had no bearing upon the privilege and power to be exercised by the Corporation for the ensuing yearly period from September 1st, 1933, to August 31st, 1934, and appellant was told to disregard the first assertion of the Secretary of State that the 1933 amendment to the Articles of Association was not to be considered (R. 17).

Appellant appealed from the determination of the Secretary of State, filing its appeal with the Corporation Tax Appeal Board on November 3rd, 1933 (R. 15, 16). The Corporation Tax Appeal Board on November 21st, 1933, made a determination sustaining the ruling of the Secretary of State (R. 18). From that determination appellant, Detroit International Bridge Company filed a petition (in the nature of a petition for a writ of certiorari) to the Supreme Court of the State of Michigan (R. 1-18).

The validity of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan, Sections 4 and 5, is herein question. Through an inadvertence, in the petition for writ of certiorari in the appeal to the Supreme Court of Michigan reference was incorrectly made to the Act, in paragraphs 9 (1) and (2) (R. 4, 5), but counsel by stipulation filed after the printed record was filed corrected this misreference, and the court passed upon the validity of Act No. 175 of the Public Acts of 1929, Sections 4 and 5, which is here involved.

The Michigan Supreme Court rendered an opinion on June 4th, 1934, sustaining the determination of the Corporation Tax Appeal Board, 267 Mich. 384, 255 N. W. 368 (R. 23-28), and entered a judgment in accordance with its opinion on June 29th, 1934 (R. 28, 29). From this determination of the Supreme Court of Michigan appellant here appeals.

SPECIFICATION OF ERRORS TO BE URGED AND QUESTION PRESENTED

The question here presented to the Court is set forth in the three Assignments of Error filed by the appellant in lodging this appeal. The three Assignments of Error (R. 33, 34) are here urged, as follows:

> (1) The Supreme Court of the State of Michigan erred in holding (a) that Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929 of the State of Michigan (Sections 10140, 10143, 10144 and 10145 of the Compiled Laws of Michigan, 1929, inclusive) is constitutional in application to plaintiff and its business, (b) said Act, so far as applied to plaintiff, does not violate Article I, Section 8, Clause 3, of the Constitution of the United States, and (c) in applying said statute and imposing the privilege fee for the year 1933 upon plaintiff, the State of Michigan did not unduly interfere with and thereby usurp or violate the power of Congress of the United States to regulate such foreign commerce as is provided by Article I, Section 8, Clause 3, of the Constitution of the United States.
>
> (2) The tax imposed by Section 4 of said Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act 175 of the Public Acts of 1929 of the State of Michigan, not being imposed on the privilege to be a corporation (such tax being imposed by Section 3 of said Act No. 85 of the Public Acts of 1921, as amended by Section 3 of Act No. 175 of the Public Acts of 1929, but being imposed on the privilege to do the business for which organized and such business of the plaintiff being solely and exclusively the maintenance and operation of an instrumentality of foreign commerce, viz., an international highway toll bridge such privilege (as distinguished from the privilege

to be organized as a corporation with power to do such business if permitted by the competent authority) is not grantable by or otherwise within the competency of the State of Michigan, but is solely within the jurisdiction of Congress under Article I, Section 8, Clause 3 of the Constitution of the United States and the Supreme Court of the State of Michigan erred in not holding said Section 4 of said Act not applicable to plaintiff and its business or not valid under said provision of the United States Constitution if so applied.

(3) Under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, it is provided that in computing the annual privilege fee imposed upon corporations that property used exclusively in foreign commerce be excluded from the computation of the tax; that even if the imposition of said tax upon petitioner and plaintiff in error is proper (which we deny), the Supreme Court of the State of Michigan erred in not excluding from the computation of said tax the property of the petitioner and plaintiff in error, which is used exclusively in foreign commerce.

MICHIGAN STATUTES INVOLVED

The question here to be determined on this appeal is whether or not the statute providing for the payment of an annual privilege fee by corporations can be constitutionally applied to, and whether this annual tax can be validly imposed upon, the appellant corporation. The section of the statute in question, Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, is:

"Sec. 4. Privilege fee, Basis of. Every corporation organized or doing business under the

> laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

Section 3 of Act No. 85 of the Public Acts of 1921, in force at the time the appellant corporation was organized, provided for the payment by every domestic corporation organized for profit and every foreign corporation applying for admission to do business within the State "of an organization fee—for the privilege of exercising its franchise within the state." This organization tax was paid by the Detroit International Bridge Company to the State upon incorporation. This provision of the Act, Sec. 3, reads as follows:

> "Sec. 3. Every domestic corporation hereafter organized for profit, and every foreign corporation for profit hereafter applying for admission to do business within this state, shall at the time of filing its articles or applying for admission, as the case may be, pay to the secretary of state, as

> an organization fee and for the privilege of exercising its franchises within this state, a sum equal to one mill upon the dollar for each dollar of the authorized capital stock of such corporation; and each corporation heretofore or hereafter incorporated under the laws of or admitted to do business in this state, shall pay a proportionate fee upon each and any increase in its authorized capital stock made subsequent to the passage of this act. * * * "

Section 3 of Act No. 175 of the Public Acts of 1929, in force in 1929, having similar provisions, except that the franchise fee imposed under that act was reduced to one-half mill. The other language in this section of the statute is identical.

We have further submitted that even though appellant Corporation were otherwise subject to the imposition of the annual privilege fee, that under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts of 1929 of the State of Michigan, the portion of the Corporation's property used exclusively in interstate or foreign commerce should have been excluded from the computation of the tax. Section 5 of Act No. 175 of the Public Acts of 1929 for the State of Michigan provides as follows:

> "In the case of computing the franchise and privilege fees prescribed by sections three and four of this act, respectively, both as to domestic and foreign corporations, such computation shall be made upon the corporation's property, both tangible and intangible, owned or used in Michigan in the ratio that such property bears to the entire property of the corporation, and such ratio shall be applied by the secretary of state to determine the amount of the authorized capital stock owned or used in Michigan and to determine what portion

of the corporation's paid-up capital and surplus severally, are owned or used in Michigan. The term 'surplus' as used in this act shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the privilege fee thereon, by reason of any impairment of the same. **None of the property or capital of any corporation subject to paying the privilege fee prescribed in Section Four which is located without the State of Michigan, and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation of the net amount of the authorized capital, or the capital and surplus, as the case may be, upon which the computation of the privilege fees shall be made;** Provided, That in determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, such property shall be considered to be located, owned or used in this state for the purposes hereof, if used in or acquired from the conduct of its business in this state, irrespective of the domicile of the corporation. The secretary of state shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least one dollar, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the secretary of state, whichever may be the higher.

(Bold face our own to call attention of the Court to pertinent provision of this section.)

In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purpose of this act."

ARGUMENT

When the Detroit International Bridge Company appealed the case involving the 1930 privilege fee to the United States Supreme Court, counsel for the Corporation Tax Appeal Board raised a factual question as to whether or not the incidental powers contained in the amended Article III were so broad that it might then be said that the Detroit International Bridge Company had power to engage in business (local in nature) other than the exclusive operation of this international highway bridge. The United States Supreme Court because of this asserted factual defense did not pass upon the question of whether or not the appellant was engaged in foreign commerce and whether or not the State of Michigan could validly impose the annual privilege fee.

Article III of the Articles of Association were thereupon amended by appellant Corporation on May 3rd, 1933, so that it appears in substantially the form contained in the original Articles of Association as filed. The incidental purposes contained in the first amendment of August 5th, 1927, were eliminated and it is now indisputable that the only power appellant Corporation has under its Articles of Association is to own, operate and maintain this international highway bridge. The issues are now, therefore, admittedly clear cut and defined.

There are three major issues here involved. The appellant, Detroit International Bridge Company, contends:

(1) that by owning, operating and maintaining the Detroit International bridge for vehicular and pedestrian traffic across the Detroit River, a navigable stream, from Detroit, Michigan, to Sandwich, Ontario, Canada, that it is and has been engaged exclusively in the business of foreign commerce;

(2) that the Detroit International Bridge Company, the appellant, was not subject to the payment of the annual privilege fee for the year 1930 under sections 4 and 5 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, sections 4 and 5, because that statute imposed an annual tax upon corporations for the privilege of *doing* business (as distinguished from the privilege of *being* or continuing to exist or *to be* a corporation); because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

(3) Even if the Detroit International Bridge Company were subject to the annual privilege fee, which we deny, nevertheless that portion of its capital represented by the bridge structure which is used exclusively in foreign commerce, under the express working of the taxing statute, should be excluded from the computation of the tax.

The Appellant, Detroit International Bridge Company, by owning, operating and maintaining the International Bridge from Detroit, Michigan, to Canada was engaged exclusively in foreign commerce.

The appellant, Detroit International Bridge Company, upon the completion of the bridge structure was the owner of the Detroit International Bridge and was engaged in maintaining and operating this highway bridge for the passage of vehicular and pedestrian traffic from Detroit, Michigan, to Sandwich, Ontario, Canada, charging and collecting tolls for the passage of traffic thereover.

Upon the completion of the bridge in 1929, and continuously thereafter, the Detroit International Bridge Company, the appellant, has, through its own offiicers and employees, maintained and operated this bridge. The appellant engaged in no other business whatsoever.

Under the provisions of Article III as amended on May 3rd, 1933, and at the time of filing its 1933 annual report, the powers of the appellant Corporation were limited solely to these purposes: (R. 7).

> "To operate the highway bridge, known as the Ambassador Bridge, across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and the appurtenances thereto and to own all or part of said bridge and approaches and appurtenances thereto.
>
> To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

It is now indisputable in this appeal that the appellant Corporation has engaged in no other business than

the owning, operating and maintaining of this international highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, and that under its corporate powers it can engage in no other business whatsoever.

It is the position of the appellant, Detroit International Bridge Company, that it is engaged exclusively in foreign commerce. The Corporation Tax Appeal Board, however, contends that by owning, operating and maintaining a highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, the Detroit International Bridge Company is not engaged in foreign commerce, and in this contention was sustained by the Supreme Court of Michigan. *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 267 Mich. 384.

Appellant relies upon the cases of *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, and *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 as here controlling. In the *Covington* case the Covington & Cincinnati Bridge Company was organized under the laws of both Ohio and Kentucky. The Bridge Company built and itself operated a bridge, (as does the Detroit International Bridge Company) spanning the Ohio River, charging toll for vehicular and pedestrian traffic crossing over this structure. Kentucky enacted certain laws in reference to the toll rate and operation of the bridge, which the Bridge Company in that case contended was in violation of the Commerce Clause of the Federal Constitution. The Bridge Company in that case also contended that the Kentucky enactment impaired the obligation of contract, in that the original acts of incorporation under special concurrent acts of legislature of Kentucky and Ohio providing for the construction of this bridge constituted such a contract between the corpor-

ation and both states, which could not be altered by one state without the consent of the other. The Court of Appeals of Kentucky sustained the Kentucky Act regulating the tolls. All of the justices of the United States Supreme Court voted for a reversal of the judgment of the Kentucky Court of Appeals, four of the justices, however, basing their decision on the ground that the Kentucky Act impaired the obligation of contract. The majority of the court, favoring reversal, based their decision upon the ground that the proposed legislation contravened the Commerce Clause of the Constitution.

Mr. Justice Brown, speaking for the majority of the court, said at p. 217:

> "This case involves the right of one State to fix charges for the transportation of persons and property over a bridge connecting it with another State, without the assent of Congress or such other State, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.
>
> The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196, in which the State of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and inasmuch as it appeared that the ferry boats were registered in New Jersey and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that State. 'Congress alone,' said the court, (page 204), 'therefore, can deal with such trans-

portation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States.' If, as was intimated in that case, interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line—in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to *travel in person* from Cincinnati to Covington; and while the reasons which influenced this court to hold in the *Wabash case* that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two States, it is impossible for either to fix a tariff of charges.

With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons v. Ogden,* 9 Wheat. 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as

> much a tax upon commerce as a toll upon a turnpike is a tax upon traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax is laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

In disposing of this case, the Michigan Supreme Court in its first opinion, 257 Michigan, 52, at p. 60, said:

> "* * * in *Covington, etc., Bridge Co. v. Kentucky,* 154 U. S. 204 (14 Sup. Ct. 1087), the State sought to regulate the rates of fare fo passage over a bridge spanning the Ohio river,"

which statement was amplified by the Michigan Supreme Court in its opinion, here appealed from, *Detroit International Bridge Co. v. Corporation Tax Appeal Board,* 267 Mich. 384, at p. 387, where it is said:

> "There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But the question under the statute is whether it is used in such commerce by plaintiff.
>
> Plaintiff conveys no persons or goods across the bridge or international boundary line. It merely collects tolls from such pedestrians or vehicles as use it. It provides an instrumentality which others may use in conducting foreign business. * * *
>
> It will be noted that the tolls constituted a direct burden upon the people who used the bridge in interstate commerce."

The Michigan Court following the argument of appellee, Corporation Tax Appeal Board, emphasizes the fact that the appellant, Detroit International Bridge Company,

merely operates an instrumentality of foreign commerce, but that it is not engaged in foreign commerce in that it does not physically transport persons or vehicles over the bridge, and that those persons walking over or crossing over by vehicle and not the Bridge Company are the ones engaged in foreign commerce.

Counsel for the appellee and the Michigan Supreme Court attempt to distinguish the case of *Covington & Cincinnati Bridge Company v. Kentucky, supra,* from the case at bar on the grounds that the question there involved was the power of a State to regulate tolls of an interstate bridge, whereas in the case at bar the question involved is the power of the State to impose a privilege tax for operating the bridge, and the mere operation of the bridge does not constitute the engaging in commerce. This attempt to distinguish the *Covington* case is unsound. It is most significant that in the *Covington* case, the court cited and relied as its principal authority upon the case of *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196. The *Gloucester* case did not involve the attempt of a state to regulate the tolls of an interstate Ferry Company operating from the shores of one state to the shores of another state, but determined, as does the case at bar, the constitutional limitation upon the power of a state to impose a capital stock tax upon the defendant Ferry Company in the nature of a privilege tax for the privilege of exercising its corporate franchise.

In the *Gloucester Ferry Company* case, the Gloucester Ferry Company, plaintiff in error, was a New Jersey corporation which maintained and operated a ferry across the Delaware River from the town of Gloucester, New Jersey, to Philadelphia, Pennsylvania, and ferried passengers and freight across the river between those places. It never transacted any other business, just as in the

case at bar, the appellant, Detroit International Bridge Company, has never engaged or transacted any other business but that of operating and maintaining this international highway bridge between Detroit, Michigan, and Sandwich, Ontario, Canada. The Ferry Company leased a dock in Philadelphia, which was needed for its business. It owned no other property in Philadelphia. The State of Pennsylvania attempted to impose an annual privilege tax on the Ferry Company, a foreign corporation "doing business in this Commonwealth or having capital employed in this Commonwealth". The Ferry Company contended, as the appellant, Detroit International Bridge Company, here contends, that it was engaged exclusively in interstate commerce, and that the State of Pennsylvania could not impose this annual privilege tax upon it for doing business since the only business in which it had engaged was that of foreign commerce, and that by so doing the State of Pennsylvania was violating the Commerce Clause of the Constitution of the United States. The Supreme Court of Pennsylvania sustained the tax imposed by the State of Pennsylvania, just as the State of Michigan in the case at bar has sustained the annual privilege tax imposed by the State of Michigan. The United States Supreme Court in the *Gloucester* case reversed the Pennsylvania Court of Appeals and held that the attempted imposition of this privilege tax was in violation of the Constitution of the United States.

In the *Gloucester Ferry Company* case the Attorney General for the State of Pennsylvania in his argument raised the question at 114 U. S. 202, that:

> "* * * if a ferry business is rather in aid of commerce than commerce itself * * * then we submit that the tax is not an interference with commerce* * *"

just as counsel for the appellant contend that the operation and maintenance of an international highway bridge is merely in aid of, or an instrument of, foreign commerce, and that the imposition of the privilege tax here questioned is not for the privilege of engaging in foreign commerce. The Supreme Court of the United States in the *Gloucester Ferry Company* case said at p. 203:

> "It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control *all the instrumentalities by which that commerce may be carried on,* and the means by which it may be aided and encouraged (italics our own). The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern

> the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress."

Relying upon its decision and rule in the *Gloucester Ferry Company* case, this court in the *Covington & Cincinnati Bridge Company* case holds that the operation of an interstate bridge is like the operation of an interstate ferry, and there is no difference in the application of the rule because one is stationary and the other movable. It must follow, therefore, because of the reliance by the court in its opinion in the *Covington* case upon the decision of the *Gloucester Ferry Company* case, that if the operation of a bridge were involved instead of the operation of a ferry that the result would have been the same; that is that an attempt by a state to impose a capital stock tax in the nature of an annual privilege fee upon the corporation for the purpose of operating an interstate bridge (ferry) was in violation of the Commerce Clause of the Federal Constitution. And though the power of a court to regulate tolls of an interstate bridge was involved in the *Covington* case (which is the attempted basis for a distinc-

tion by the Michigan Court for the case at bar), the United States Supreme Court in the *Covington* case relies as authority for its decision upon a case which involved a privilege tax, the question there determined being similar to that presented in the case at bar.

It is particularly significant that this court in the same term in which it decided the *Covington* case said, in the case of *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 439, at p. 446 (italics our own):—

> "All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no State shall attempt to impose the added burden of a license or other tax for the *privilege of using, constructing, or operating any bridge*, or other instrumentality of interstate commerce, or for the carrying on of such commerce."

Although a direct property tax was involved in the *Backus* case, as distinguished from a privilege tax involved in the case at bar, nevertheless the court in the *Backus* case, having in mind the *Covington* case decision which the court decided in that very same term, would not have made the foregoing statement about the power of a state to tax the privilege of *using*, construcing or *operating* an interstate bridge, if as counsel for appellee in the case at bar contend, the court in the *Covington* case did not regard the operation of an interstate highway bridge as engaging in interstate commerce.

The cases of *Henderson Bridge Company v. Kentucky*, 166 U. S. 150, and *Arkansas & Memphis Railway Bridge & Terminal Co. v. State*, 174 Ark. 420, 295 S. W. 378, relied upon by the appellee and cited as controlling by the Michigan Supreme Court are distinguishable from the case at bar.

In the *Henderson Bridge* case, the Bridge Company was incorporated under the laws of Kentucky and was also granted certain powers and privileges under the laws of Indiana. The Company constructed, owned, maintained and operated a railroad bridge across the Ohio River from Kentucky to Indiana. The Board of Valuation and Assessment for the State of Kentucky made an assessment against the Bridge Company and not only included the tangible physical property of the Bridge Company located in Kentucky, but also valued the franchise granted to the incorporators by the State of Kentucky in so far as that franchise was referable to the Kentucky portion of the bridge. The Bridge Company refused to pay that portion of the tax which was predicated upon the assessment of the franchise contending that this portion of the tax was in fact a franchise tax or a privilege tax for the privilege of engaging in this interstate business, and being a tax upon the privilege of doing business violated the Commerce Clause of the United States. The court by a majority opinion, four of the Justices joining in a vigorous dissent, decided as appears on pg. 154 of the opinion:

> "The tax in controversy was nothing more than a tax on the intangible property of the Company in Kentucky."

The majority treated the tax as a direct personal property tax, including this franchise as an intangible asset. Clearly even though the bridge were engaged in interstate commerce, it was then and is now well decided that a direct property tax may be imposed by a sovereignty upon corporate assets located within that sovereignty, even though those assets are used exclusively in interstate commerce. *St. Louis & East St. Louis Ry. Co. v.*

State of Missouri, 256 U. S. 314; *United States Express Company v. Minnesota,* 223 U. S. 335; *Fargo v. Hart,* 193 U. S. 490; *Postal Telegraph & Cable Co. v. Charleston,* 153 U. S. 692, 700.

In the case of *Greene v. Louis & Interurban R. R. Co.,* 244 U. S. 499, this court restated the rule of the *Henderson case,* saying at the bottom of p. 510:

> "It has been held by the Kentucky Court of Appeals, and by this court, that the 'capital stock of the corporation,' here referred to, includes its entire property of every kind and description, tangible and intangible, and that what is called a 'franchise tax' is nothing else than a tax upon the intangible property of the company in Kentucky. *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150, 154. *Henderson Bridge Co. v. Commonwealth,* 99 Ky. 623, 639, 641."

The tax upon the franchise in the *Henderson* case was nothing more than a direct property tax upon the value of a franchise as intangible personal property, which was located within the State of Kentucky, and was not imposed for the exercise of any corporate privilege.

The statement of the Court in the *Henderson* case, upon which appellee and the Michigan Court rely in the case at bar, that the tax was not a tax on interstate commerce carried on by means of the bridge because the Bridge Company did not transact such business, and that only the persons going over the bridge carried on the business of interstate commerce, was wholly unnecessary to the decision in the *Henderson* case and is not now binding upon the court. Treating the tax as a direct property tax as distinguished from the tax for the privilege of doing business within the state like the tax in the case at bar, the decision of the Supreme Court in the *Hender-*

son case would necessarily have been the same as it was regardless of whether the Bridge Company were engaged in interstate commerce or not.

Four of the Justices joining in the dissenting opinion of the minority in the *Henderson* case differed from the majority of the court in determining the nature of the Kentucky tax, as well as on the question of whether or not the Bridge Company was engaged in interstate commerce. The minority of the court treated the Kentucky tax as a pure franchise or privilege tax, as distinguished from a direct property tax and submitted that in its opinion that this tax being imposed upon the privilege of doing the business in question and was unconstitutional as being a direct imposition of a tax for the privilege of doing interstate business.

Mr. Justice White, who wrote the dissenting opinion in which three other justices of the court concurred, two of whom had joined in the majority opinion in the *Covington & Cincinnati Bridge Company case,* said at p. 166:

> "• • • *it is a tax upon the value of the exercise of the privilege of using the bridge, of charging for the running of locomotives across the bridge, and of doing the business of interstate commerce in any form,* I cannot bring my mind to the conclusion that the tax is only levied on the mere franchise to exist as a corporation conferred by the State of Kentucky."

Further treating with the dictum in the majority opinion that the interstate commerce was carried on by the individuals going over the bridge and was not carried on by the Bridge Company, Mr. Justice White, expressing the dissenting opinion of the court, said at p. 168:

"The contention that although the traffic over the bridge may be interstate commerce and the receipts from said traffic be interstate commerce receipts, yet the tolls paid to the bridge company are not receipts from interstate commerce business transacted by the bridge company, is a mere distinction without a difference. What, may I again ask, is the toll paid to the company for the use of the bridge but the result of a contract entered into for the purpose of carrying on interstate commerce? In the *Covington Bridge* case the sole question was as to the right of the State of Kentucky to regulate the amount of tolls to be received by the bridge company. The right of the State was denied on the ground that the tolls were a matter of interstate commerce, that is, that the business of operating the bridge and charging for the use thereof was interstate commerce and not subject to state control. In that case then, the tolls were adjudged to be receipts from interstate commerce; in the case at bar, they are declared not so to be. The far-reaching consequence of this asserted distinction is well calculated to arouse solicitude for the future. A large portion of the interstate commerce business of the country is carried on by freight lines. These lines arrange with the railways for transportation, pay them a charge or toll, and upon this basis afford the public increased business facilities. Under the supposed distinction all this interstate commerce traffic ceases to be such, and the whole of the gross receipts become taxable in every State through which the business passes. The freight lines do not transport the merchandise; the railways do; therefore the receipts of the freight lines as to such lines are not interstate commerce receipts. This illustration is but one of the many which at once suggest themselves. All the express business, the sleeping car business, the tank lines, and manifold other forms of interstate commerce, will be stricken down if the rule now applied to the tolls of an interstate

bridge be enforced as to other means of interstate commerce.

Where, also, I submit, does a distinction exist between this case and the case of the ferry between Pennslyvania and New Jersey, considered in the *Gloucester Ferry* case, or the attempt of the State of Illinois to regulate freight charges between that State and New York, embraced in the *Wabash* case, supra? Manifestly, there is an irreconcilable conflict between the decision in this case and the rulings of the court in the cases just cited. It follows that in order to maintain the tax in the case at bar the decisions referred to must be and are, as I conceive, substantially overruled by the opinion now announced."

The majority of the court in the *Henderson* case did not, by its opinion, consider that *Covington & Cincinnati Bridge Company* case overruled. On page 153 the court said:

> "The regulation of tolls for transportation over the bridge considered in *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, presented an entirely different question."

And the minority of the court in the *Henderson* case expressly stated that the *Covington & Cincinnati Bridge Company* case and the *Gloucester Ferry Company* case were directly in point and there applicable, just as we contend they are here applicable in the case at bar.

To summarize the statement in the majority opinion of the court in the *Henderson Bridge Company* case that the bridge company was not engaged in interstate commerce is pure dictum, not necessary to the decision and is not here controlling. The ruling of the majority of the court in the *Henderson Bridge Company* case may be summarized as follows: A state may impose a property tax upon a Bridge Company which owns, operates and maintains a

bridge from one state to another on that portion of the tangible and intangible property of the Bridge Company located within the taxing state, the tax being a direct property tax as distinguished from a privilege tax for a corporate privilege of operating said bridge. With this rule we are wholly in accord. That question is not involved in the case at bar. The dictum in that case that the Bridge Company was not engaged in interstate commerce was wholly unnecessary to that decision and is not here controlling. However, if the tax involved in the *Henderson Bridge Company* case was a privilege tax for the privilege of owning, operating and maintaining the bridge from one state to another, as the minority of the court in the *Henderson Bridge Company* case held, then the dissenting opinion should be given the weight of judicial determination.

The other case relied upon by appellee and the Michigan Supreme Court, *Arkansas & Memphis Railway, Bridge & Terminal Co. v. State*, supra, can be distinguished from the case at bar. In that case the Bridge Company did not itself operate the bridge, but leased the structure to other persons, who in turn operated the structure. As the court in the *Arkansas* case, said, referring to the appellant, at page 425:

> "*It does not operate the bridge and does not carry either passengers or goods, in fact it does nothing in the way of commerce, either intrastate or interstate.* It owns, leases, repairs and maintains the bridge across the Mississippi river, and, while the bridge may be an instrumentality of interstate commerce so far as the carriers are concerned, the bridge company has nothing whatever to do with carrying either freight or passengers and therefore does not use the bridge as an instrumentality for interstate commerce or any other kind of commerce."

And further at page 426:

> "As we have said, the bridge company merely owns the bridge, *leases* it and maintains it. If a company owned a boat or a number of boats, and leased them to a carrier or to any person or corporation who used the boat in carrying persons or freight in interstate commerce, the boat would be used in interstate commerce, the carrier would be engaged in interstate commerce, but the owner of the boat would have no connection whatever with interstate commerce. And we therefore think that the bridge company in this case is not engaged in interstate commerce, and it is not engaged in the operation of an instrumentality used in interstate commerce."

In the case at bar the Detroit International Bridge Company itself operates the bridge. It engages in the foreign commerce of furnishing the structure for transporting people across the Detroit River over and upon its highway structure. The transporting of vehicles and persons from one country to another over a highway structure is as much engaging in foreign commerce as though they were transported by boat or train.

In the *Arkansas* case, the court stated that if a ferry company owning ferry boats leased the boats to another company, as did the bridge company in the *Arkansas* case, that the company owning and maintaining the ferry boats, but leasing the same to another company which operated them, would not be carrying on interstate commerce. Following this reasoning, then if the ferry company in the *Gloucester Ferry Co. v. Pennsylvania* case, supra, leased boats to another company, which operated them, or if the Bridge Company in the case at bar leased the bridge to another company, which operated the bridge, then the company could not claim to be engaged in interstate or

foreign commerce. However, in the case at bar, as in the *Gloucester Ferry* case, the Bridge Company does *not* lease out the operation of the bridge, and, therefore, the Arkansas case cannot be authority for the claim of the appellee that a company that actually maintains and operates an interstate bridge or an interstate ferry is not engaged in interstate commerce.

Counsel for the Corporation Tax Appeal Board cannot be sustained in their contention that the appellant is not engaged in foreign commerce. In the case at bar it is impossible to use the bridge in other than foreign commerce. From the very inception of its construction it has been exclusively an instrumentality of foreign commerce — physically incapable of any other use.

A company owning and operating ferry boats carrying passengers from one state to another or from this country to another has been held to be engaged in the business of interstate and foreign commerce. *Glouster Ferry Co. v. Pennsylvania,* 114 U. S. 196 (supra); *City of Sault Ste. Marie v. International Transit Co.,* 234 U. S. 333; *Mayor of Vadalia v. McNeeley,* 274 U. S. 676.

A company owning and operating a pipe line for gas or oil from one state to or through another state has been held by this court on several occasions to be engaged in the business of interstate commerce. *Ozark Pipe Line Corporation v. Monier, the State Tax Commission of Missouri,* 266 U. S. 555; *Eureka Pipe Line Co. v. Hallanan,* 257 U. S. 265; *United Fuel & Gas Co. v. Hallanan,* 257 U. S. 277.

To hold that the spanning of a stream by ferry boats from the shore of one state to that of another, or the spanning of distances by pipe lines through which gas or oil flows is interstate commerce, and on the other

hand to contend, as does the Corporation Tax Appeal Board, that the spanning of the distance by a bridge over a navigable stream over which vehicles and pedestrians travel from the shore of one state to that of another state or country is not interstate or foreign commerce is to raise a fine distinction with no essential difference. The position is inconsistent and insupportable.

A telephone company carrying on operations from one state to another provides the wires over which a person in one state may communicate with a person in another state, just as an interstate bridge company affords the means for a person to travel from one state to another.

A telephone company merely affords the instrumentality over which the voice of a person is carried from one state to another. Without physical expression of the person using the telephone the mere affording of the instrumentality would be insufficient to carry on the interstate commerce.

The Detroit International Bridge Company, the appellant, transports passengers and vehicles over this structure as much as a ferry company, by its boats, transports its passengers, or as much as a pipe line company transports oil or gas, or a telephone carries the voice of a person in one state to another. If the bridge were a swing or draw bridge actually moving and lifting the passengers and vehicles from one shore to another, that contention could not be raised. To hold that a swinging or draw bridge would thereby constitute the appellant's business as that of foreign commerce, and a stationary bridge, such as the one here involved, would not be foreign commerce, merely emphasizes the fine hairpoint distinction counsel for the appellee attempt to make. As has been pointed out hereinabove,

this court has ruled out any attempt to distinguish a bridge from a ferry boat on the ground that one is movable and the other is a fixture in the *Covington Bridge Company* case, *supra.*

The United States Supreme Court has held that the Federal government may itself construct a bridge across a stream from one state to another as a means of linking up an interstate highway under the powers to regulate interstate and foreign commerce. In the case of *Luxton v. North River Bridge Co.,* 153 U. S. 525, 530, the court said:

> "From these premises, the conclusion appears to be inevitable that although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."

This same rule was announced in the case of *California v. Central Pacific Ry. Co.,* 127 U. S. 1, 36; *Latinette v. City of St. Louis,* 201 Fed. 676; *Stockton v. Baltimore New York Ry. Co.,* 32 Fed. 9; *Wilson v Shaw,* 204 U. S. 24. I the ownership, operation and maintenance of a bridge from one state to another or from one country to another was not engaging in interstate or foreign commerce, then clearly the Federal government would have no power under the Commerce Clause of the Constitution to authorize a Federal corporation to *construct, own* and *operate* such a bridge as was held proper in the *Luxton* case.

The Detroit International Bridge Company, the appellant, owning, operating and maintaining this highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, must be held to be engaged in foreign commerce.

The Appellant, Detroit International Bridge Company, has no power under its corporate charter to engage in any other business than that of maintaining and operating this international highway bridge, and since its incorporation has engaged exclusively in this business.

When the Detroit International Bridge Company was first organized the purpose clause of the Articles of Incorporation filed on June 21st, 1927, limited its power solely to the following purposes (R. 19):

ARTICLE III.

"The purpose or purposes of this corporation are as follows:

Constructing, owning and/or operating a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada."

Later, on August 5th, 1927, Article III of the Articles of Incorporation of the Detroit International Bridge Company was amended so as to expressly provide for the acquisition and maintenance of real estate and other powers which it believed were purely incidental powers of any corporation, neither limiting or extending the general and primary corporate purpose of owning, operating and maintaining this international highway bridge.

The Corporation questioned the power of the State of Michigan to impose the 1930 annual privilege tax under

the same law, still in effect, and appealed to this Court from the determination of the Michigan Supreme Court sustaining the imposition of that tax.

The Bridge Company claimed that these other powers were merely incidental to the main purpose of operating this international highway bridge. The United States Supreme Court in its decision (287 U. S. 295) did not pass upon the constitutionality of the Act, but said at page 297:—

> "We do not consider whether appellant is engaged in foreign commerce for we are of opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause."

Thereupon, although appellant had been of the opinion that the additional provisions in the amendment to Article III of the Articles of Association of August 5th, 1927, were merely incidental to the primary power, nevertheless it caused Article III to be amended on May 3rd, 1933, so as to read as follows (R. 7):

> "ARTICLE III.
>
> The purpose or purposes of this corporation are as follows:
>
> To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.
>
> To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

This in substance, is similar to Article III that appeared in the original Articles of Association.

On August 30th, 1933, the Detroit International Bridge Company filed its annual report for the year 1933 as is required by Section 82 of Act No. 327 of the Public Acts of 1931, and enclosed therewith its check for $2.00 to cover its filing fee, setting forth in its letter to the Secretary of State that the Articles of Association had been amended on May 3rd, 1933, as is hereinabove set forth, and that it was now indisputable that the only power the corporation had was to engage in the carrying on of foreign commerce and that it had no power whatsoever under its Articles of Association to do a local business. The appellant, Detroit International Bridge Company, further stated:

> "It is, therefore, the position of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States" (R. 13; see statement in 1933 report, R. 12).

In the annual report filed, the bridge structure was designated as used exclusively in interstate or foreign commerce (R. 15).

At the time of filing the annual report for 1933 here involved in this present appeal, counsel for the Corpora-

tion Tax Appeal Board have at no time, either in the hearing before the Corporation Tax Appeal Board or on the Appeal to the Michigan Supreme Court or in the appeal to this court, contraverted the statement of the appellant that it has no other power under its charter and is engaged in no other business but that of operating and maintaining the international highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada. This is the only power which the corporation has under its corporate charter and is the only business in which it has ever engaged since its inception.

Counsel for the Corporation Tax Appeal Board now claim that the power to maintain and the maintenance of that portion of the bridge situated within the State of Michigan is a purely local power. This contention is without merit.

The same claim was made by the Attorney General of Pennsylvania in the case of *Gloucester Ferry Co. v. Pennsylvania* supra, in which he contended that since the Ferry Company had the power and did operate and maintain a dock in Pennsylvania that that portion was purely local in nature, and, therefore, gave the State of Pennsylvania power to impose the annual privilege tax. This court in disposing of this contention said in 114 U. S. at p. 203:—

> "As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of pas-

> sengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation."

It has been held that one engaged in maintaining in proper condition a bridge used as an instrumentality of interstate commerce is engaged in interstate commerce. In the case of *Pedersen v. Delaware, Lackawanna & Western Rd. Co.*, 229 U. S. 146, one carrying materials to be used in repairing a bridge over which interstate trains moved was held to be engaged in interstate commerce, Mr. Justice Van Devanter, delivering the opinion of the court, there said among other things, at pg. 151:

> "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. * * * The work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

One engaged in cooking meals, making beds, etc., for a gang of bridge carpenters in a camp car which was provided and moved from place to place along the railroad line to facilitate their work in repairing bridges over which interstate trains moved was held to be engaged in interstate commerce. *Philadelphia, Baltimore & Washington Railroad Company v. Smith*, 250 U. S. 101. The court said, at pg. 103:—

> "Taking it to be settled by the decision of this court in *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152, that the

repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it."

In *Kinzell v. Chicago Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, it was held that one engaged in connection with the construction of a fill to replace a trestle (bridge) over which interstate trains moved was engaged in interstate commerce.

The United States Supreme Court has gone so far to hold that *ownership only* of a railroad *wholly within one state leased* to a railroad company doing interstate business and having exclusive possession and control for a yearly money rental would subject the lessor owner to liability as being engaged in interstate commerce, where an injury was sustained by an employee in the course of movement by the lessee railroad of a train of wholly empty cars. *North Carolina Railroad Company v. Zachary*, 232 U. S. 248.

In *State v. Bates & Rogers Construction Company*, 91 Wash. 183, 157 Pac. 483, employees of an *independent contractor* constructing piers under and for the support of a bridge on the line of the Spokane International Railroad Company over which interstate and foreign traffic moved were held to be engaged in interstate and foreign commerce.

It is indisputable that at the time of filing the 1933 annual report here involved that the appellant, Detroit International Bridge Company, was restricted by Article III of its corporate charter to the sole business of oper-

ating and maintaining this international highway bridge; that it was then engaged and could engage in no other business; that this business was and is exclusively that of foreign commerce.

The Detroit International Bridge Company is Not Subject to the Annual Privilege Tax. The Corporation, Limited by Its Corporate Charter has Been and Is Engaged Exclusively in Foreign Commerce, and to Impose the Annual Tax upon It for the Privilege of Engaging in this Foreign Commerce would be in Violation of Article 1, Section 8, Clause 3, of the Constitution of the United States.

The Michigan Supreme Court erred in sustaining the Corporation Tax Appeal Board of the State of Michigan in its holding that the imposition of the annual privilege fee upon the Detroit International Bridge Company, the appellant, under Act No. 85 of the Public Acts of 1921 as amended by Act No. 175 of the Public Acts of 1929 of the State of Michigan, Sections 3 and 4, was not in violation and in contravention of Article 1, Section 8, Clause 3 of the Constitution of the United States.

As has been pointed out hereinafter, Detroit International Bridge Company, the appellant, has been and is exclusively engaged in the business of operating this international bridge, and restricted by its corporate power to this purpose, has and could engage in no other business whatever except the carrying on of this foreign commerce.

The nature of Act No. 85 of the Public Acts of 1921, of the State of Michigan, Section 4, which, subject to amendment by Act 175 of Public Acts of 1929, Section 4, which did not change the nature thereof, is here in question, has been carefully analyzed and defined by the

Supreme Court of Michigan in a case in which the validity of the statute was attacked as being repugnant to certain provisions of the Constitution of the State of Michigan. The Supreme Court of Michigan, in that case, *Union Steam Pump Sales Company v. Secretary of State of Michigan,* 216 Mich 261, held "that it is not a property tax, but is a tax on the franchise to do business as a corporation within the state."

Distinguishing the franchise "to be" a corporation from the franchise of doing business as a corporation, the Michigan Supreme Court, after quoting at length from numerous authorities and text writers, summarized, page 272, saying:

> "These authorities demonstrate beyond cavil that there is a distinction and a well recognized one between the franchise to be a corporation and the franchise to do business as a corporation. *One is the franchise 'to be,' the other the franchise 'to do.'*. One belongs to the corporators, the other to the corporation. * * * The franchise 'to do' (belonging to the corporation) may follow the franchise 'to be' (belonging to the corporators). But each is a different franchise as the authorities above cited demonstrate and the taxation of one is not the taxation of the other, the sources of revenue are not the same, the subjects of taxation are not the same."

It was concluded by the Court, at page 268, that "The law here under consideration levies a specific tax upon the right, the franchise *to do* business as a corporation."

The privilege tax in question in the case at bar is, therefore, imposed upon the privilege of doing business and is unlike the annual privilege tax imposed in many states upon the privilege of being, or continuing to be, a corporation. The case of *Kansas City, Fort*

Scott & Memphis Ry. Co. v. State of Kansas, 240 U. S. 227, relied upon by appellee, is different from the case at bar, because in that case the annual privilege fee was imposed upon the privilege of being, or continuing to be, a corporation rather than on the privilege of doing business as a corporation. If the annual privilege tax in the case at bar were likened to that imposed in the *Kansas City* case, it would be in violation of the Michigan Constitution because the receipts from this tax are payable to a different fund than is provided under the Michigan Constitution, under the ruling of the *Union Steam Pump Sales Co.,* case, *supra.* It was necessary for the Court in the *Union Steam Pump Sales Company* case to carefully distinguish between the two different corporate franchise taxes in that the proceeds of the tax were payable to the school fund under the State Constitution if the tax were upon the privilege *to be* a corporation, whereas payments under Act No. 85 of the Public Acts of 1921, as amended, here in question, were to be credited to the general fund, and the validity of the act could only be sustained if this was a tax imposed for the privilege of *doing* business as a corporation. The case of *Ashley v. Ryan,* 153 U. S. 437, relied upon by appellee is like the Kansas case and is not in point.

The Detroit International Bridge Company, the appellant, upon its organization, paid the organization fee to the State of Michigan for the privilege of *being* a corporation. Once this privilege fee is paid upon organization there is no provision under the Michigan laws under which a further tax for this privilege of *being* is imposed. The annual privilege fee, Act No. 85 of the Public Acts of 1921, as amended, on the other hand, as has been determined by the Michigan Supreme Court, and as is apparent from the language of the statute, is for

the privilege of *doing* business as a corporation. To hold that this annual privilege fee was for the privilege of being or continuing to be a corporation would be to violate the Michigan Constitution under the decision of the *Union Steam Pump Sales Company* case (*supra*).

Counsel for the appellee contends, and we agree, that the Michigan annual privilege tax is imposed on a corporation not for the actual doing or carrying on of the business permitted under its charter, but for the privilege of exercising the corporate franchise and for the privilege of doing the business permitted under its charter, whether the privilege is exercised or not. *People of the State of Michigan v. Michigan Trust Co.*, 286 U. S. 334; *G. H. Hammond Co.*, 246 Mich. 179; *Cobbs & Mitchell v. Corporation Tax Appeal Board*, 252 Mich. 479. The 1929 amendment adopted after the *Hammond* case expressly included in the Act the ruling of that case. This annual privilege tax, however, cannot and should not be confused with the organization or franchise tax imposed upon the corporation upon its organization for the privilege of being a corporation or continuing to be a corporation, which tax has already been paid by the appellant upon its organization. The cases relied upon by appellee involve annual privilege taxes imposed upon corporations for the privilege of being or continuing to be a corporation which is not the kind of privilege tax here involved, since such a tax would require the payment of the proceeds to a fund specified under the constitution of the State of Michigan, which is a different fund than that specified under this annual privilege tax act. This act, if construed as a tax on the privilege to be or to continue to be, would be in violation of the Michigan constitution. *Union Steam Pump Sales Co. v. Secretary of State,* supra.

Attention should further be called to the case of *Anglo-Chilean Nitrate Sales Corp. v. Alabama,* 288 U. S. 218; 77 L. Ed. 711. Although this court pointed out in that case that the Alabama statute was unlike the Michigan statute, in that the Alabama statute imposed the tax for the doing of business, whereas the Michigan statute imposed the annual tax for the *privilege of doing the business.* However, that distinction is not pertinent in the case at bar. If the appellant had power to do a local business under its charter but did not exercise this privilege, then the distinction might become pertinent as it was in the Michigan case of *G. H. Hammond Company,* supra. The appellant has no power under its charter to engage in any local business whatsoever. Not only does appellant Corporation engage exclusively in the business of foreign commerce, but it has no power under its charter to engage in any other business. To impose the privilege tax for the privilege of exercising its corporate powers, when the sole corporate power of appellant is to engage in foreign commerce, is to impose a privilege tax upon the appellant for the privilege of engaging in foreign commerce.

The annual privilege tax of Michigan then is for the privilege of doing the business permitted to be done under the corporate charter, whether the business is actually carried on by the corporation or not. However, in the case at bar the only business which the appellant Corporation may carry on under its charter is that of engaging in foreign commerce. It has no power whatsoever to engage in any business of a local nature. The proposition then is whether the State of Michigan has the power to impose a tax upon the appellant Corporation for the privilege of engaging in foreign commerce since that is the only business in which the corporate charter permits the appellant Company to engage.

The principle of Constitutional law, that a state cannot impose a tax or fee upon interstate and foreign commerce is too firmly established to require the voluminous citation of authorities that pronounce the rule. It should suffice to refer to a few leading cases. This principle was broadly announced in the *Minnesota Rate* case, 230 U. S. 352, at pg. 400 as follows:—

> "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or *the privilege of engaging in it*, or upon the receipts (see numerous authorities there cited)."

Ozark Pipe Line Corporation v. Monier, et. al., 226 U. S. 555 (*supra*), constituting the State Tax Commission of the State of Missouri, and cases therein cited. See the recent statement of the United States Supreme Court in the case of *Minnesota v. Blasius*, 54 Sup. Ct. 34, at page 36 and cases therein cited.

The cases of *Philadelphia & Southern Steamship Company v. Pennsylvania*, 122 U. S. 327, 7. Sup. Ct. 1118, 30 L. Ed. 1200, and *Ozark Pipe Line Corporation v. Monier, et. al., (supra)*, should be controlling of the issues here involved. In the *Philadelphia & Southern Steamship Company* case the Steamship Company engaged exclusively in the business of operating sea-going steamships for ocean transportation between the different states of the United States by way of the ocean, and between the United States and foreign countries. The state of Pennsylvania enacted a law whereby it attempted to impose a tax upon the gross receipts of such companies derived from the transportation of persons and property by sea between different states and to and from foreign countries. The Philadelphia & Southern Steamship Com-

pany was a domestic corporation organized under the laws of Pennsylvania. As Mr. Justice Bradley, speaking for the Supreme Court, announced at pg. 335:—

> "This question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress."

The Court held, at pg. 336, that:—

> "The transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this Court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the states upon that branch of commerce would be a palpable interference."

In commenting upon this case in the Detroit International Bridge Company, the Michigan Supreme Court in its first opinion (257 Mich. 52) said:

> "The tax was levied upon the gross receipts of a steamship company * * * "

thereby leaving the inference that such a tax was to be distinguished from the imposition of an annual privilege tax. It must be noted, however, that in the *Steamship Company* case a large portion of the opinion of the Court was devoted to the consideration of the tax imposed upon the Steamship Company as being in the nature of a franchise tax. It was contended by the State of Pennsylvania in that case that the tax was upon the franchise of the corporation granted to it by the State. And commenting upon this issue, the Court, at pg. 342, said:—

> "If intended as a tax on the *franchise of doing business,*—which in this case is the business of transportation and carrying on interstate and foreign commerce,—it would clearly be unconstitutional. It was held by this Court in the case of *Gloucester Ferry Company, v. Pennsylvania,* 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals."

So to summarize, if this annual tax imposed by Pennsylvania upon the Steamship Company, measured by its gross receipts, was in the nature of a privilege tax for doing business, as was contended by the Attorney General of Pennsylvania, such a tax, according to the ruling of the United States Supreme Court in that case, would be unconstitutional and in violation of the Commerce Clause. The issues there determined are identical to those presented to the Court in the case at bar.

As was decided in the case of *Sault Ste. Marie, v. International Transit Company,* 234 U. S. 333, 340, (*supra*), a state may not make commercial intercourse with another state or a foreign country a matter of local privilege, and require that it can not be carried

on without its consent, or exact a fee as the price of its consent for the privilege of doing this interstate foreign business. This Court in the case of *In Re Detroit International Bridge Company*, 257 Mich. 52, said that this case could be distinguished because the City sought to enforce the collection of a license fee. It is respectfully submitted by the appellant that the imposition of a license fee is for the privilege of conducting business, just as the privilege fee imposed by the State of Michigan by Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, is for the privilege of engaging in the business permitted by the corporate charter of the Company, and since the only power which appellant has under that charter is to engage in the business of foreign commerce, the imposition of this privilege fee is imposed for the privilege of engaging exclusively in foreign commerce and, therefore, contravenes the Commerce Clause of the Federal Constitution.

The case of *Ozark Pipe Line Corporation v. Monier* (*supra*) can not be distinguished and is conclusive upon the question here before the Court for determination. In that case the State of Missouri attempted to impose an annual privilege tax upon the Ozark Pipe Line Corporation for the privilege of doing business in the State. The nature of the Missouri tax was similar to that of the Michigan annual privilege tax. It was imposed on a corporation for the privilege of doing business in the State, as distingushed from such privilege taxes as are imposed by some states for the privilege of being, or continuing to be, a corporation. The Ozark Pipe Line Corporation was a foreign corporation, the sole business of which was to transport crude oil from one state to another through its pipe lines. It engaged exclusively in interstate commerce. In Mis-

souri it carried crude oil through its pipes from one state, through Missouri, to another state. The United States Supreme Court held that this tax was unconstitutional. Mr. Justice Sutherland, speaking for the Court, at page 562, stated:

> "The tax is one upon the privilege or right to do business, *State Ex rel. v. State Tax Commission*, 282 Mo. 213, 234; *and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed.* It long has been settled that a State cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on."

This Court recently followed the same rule in the case of *State Tax Commission of Mississippi v. Interstate Natural Gas Company*, 284 U. S. 41, 52 Sup. Ct. 62.

The Michigan Supreme Court in its opinion appearing in 257 Michigan at page 60 said that the *Ozark Pipe Line* case and the *Interstate Natural Gas Company* case could be distinguished in that in those cases:

> "The state sought to enforce a statute providing for the collection of such a tax on corporations not organized under its laws and exclusively engaged in interstate commerce."

However, the United States Supreme Court in the *Monier* case held that this same rule must apply to a domestic corporation, where the tax sought to be imposed is one upon the privilege of doing business and the only business done or that can be done by the domestic corporation is interstate or foreign business. Com-

menting on this point, Mr. Justice Sutherland speaking for the court said at page 567:

> "Nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the State an authority, denied by the Federal Constitution, to regulate interstate commerce. *The State has no such power even in the case of domestic corporations. See Philadelphia S. S. Co. v. Pennsylvania,* 122 U. S. 326, 342. The statute as applied to appellant is unconstitutional."

The argument was made in the case of *Philadelphia & Southern Steamship Company v. Pennsylvania supra,* that although this tax for the doing of interstate or foreign business could not be imposed upon a foreign corporation, it might nevertheless be imposed upon a domestic corporation, which derives its powers from the State. The Court in the *Philadelphia and Southern Steamship Company* case, at page 344 said:

> "The decision in this case and the reasoning on which it is founded so far as they relate to the taxation of interstate commerce carried on by corporations, *apply equally to domestic and foreign corporations.* No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are exercising a franchise."

We are not unmindful of the case *In re Detroit & Windsor Ferry Company,* 232 Mich. 574. That case is not here controlling and furthermore can be distinguished from the case at bar. In that case the business of the Ferry Company was not restricted exclusively to foreign commerce. A portion of its business was devoted to intrastate business, that is, operating a ferry service to and from Belle Isle, which is a part of the City of Detroit. The Detroit and Windsor Ferry Company could and did engage in intrastate commerce and had the ability and power under its charter and the purposes therein enumerated and granted, to devote itself to business other than purely foreign or interstate commerce.

In the case at bar the Detroit International Bridge Company is restricted by the corporate powers granted to it by its charter to operate an international highway bridge, and under these limited powers, it can engage in no business other than that of this foreign commerce.

A corporation only possesses such powers as are expressly enumerated in and granted to it by its charter as limited by its Articles of Association. The corporation has no inherent rights such as belong to individuals. Its activities must be confined specifically to those powers granted to it under its charter and the very grant of enumerated powers of necessity excludes any other powers not therein mentioned. This is the general and prevailing rule of law in this country. *Thompson on Corporations,* 3rd Ed. Vol 3, Sec. 2183; *Fletcher Cyc. Corporations,* Vol. 2, Secs. 775 and 784. And this is and has been the prevailing rule in Michigan since the earliest times. In the case of *Bank of Michigan v. Miles,* 1 Douglas (Michigan) 401, the doctrine is forcibly pronounced at page 403 as follows:—

"In these cases the grant of power is before us. The charter defines the grant, with its restrictions and limitations. • • •

A corporation, says Ch. J. Marshall, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence: *Trustees of Dartmouth College v. Woodward,* 4 Wheat., 518. The same doctrine is asserted by McLean J., in *Beatty v. Knowles' Lessee,* 4 Pet., 152, and is, in effect, contained in all the American cases on the subject. • • •

In determining on the extent of such power in a particular instance, under a charter, we are to look at the grant and restriction; and, unless the power is found in the charter, it cannot be considered as possessed. The very grant of specified powers under restrictions, is an exclusion of other powers in reference to the same subject matter, not granted by the charter."

See *Orr v. Lacey,* 2 Douglas (Michigan) 230; *People v. River Raisin & Lake Erie Railroad Co.,* 12 Michigan 389, 395.

In the *Detroit and Windsor Ferry Company* case it might well have been said, as counsel for the Corporation Tax Appeal Board will undoubtedly argue, that the Ferry Company was required to pay for the privilege of doing corporate business whether it exercised the privilege or not since the Ferry Company had the power and did engage in business other than that of foreign commerce. Quite different is the case at bar where the Detroit International Bridge Company can engage in no business except that of operating this international highway bridge, its operations being exclusively devoted to that of foreign commerce. It can-

not forcibly or logically be argued that the International Bridge Company should be compelled to pay an annual tax for the privilege of doing an intrastate business whether it exercises this privilege or not, since it is not ever within its powers to exercise the privilege of doing intrastate business.

If this tax is imposed for the privilege of doing business upon the Bridge Company, it is and must be imposed upon it for the privilege of engaging exclusively in foreign commerce and nothing else. And clearly to impose a tax upon a corporation for the privilege of engaging in foreign commerce is in violation of the Commerce Clause of the United States Constitution.

The Michigan Supreme Court in its second opinion, *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 267 Mich. 384, said at p. 387:

> "We need not inquire whether plaintiff has any intrastate power under satutes regulating domestic corporations. Nor whether maintenance of the bridge is local business. Nor need the multitude of cases dealing with taxation and the regulation of interstate and foreign commerce be analyzed or distinguished. In plaintiff's former case and *In re Detroit & Windsor Ferry Co.*, 232 Mich. 574, where this court held that the fee is not a direct burden on foreign commerce, the fact that the corporations had local powers was not given weight. These cases are determinative upon plaintiff's liability for the fee."

If the court announced as a rule in the *Windsor Ferry Co.* case, and relied upon that decision in the case at bar, on the broad grounds that the annual privilege tax was not a burden on foreign commerce, regardless of the fact that the Ferry Company had power under its

charter to do a local business, which appellant has not in the case at bar, we submit that the court erred in the *Windsor Ferry Co. case*, as it did in the case at bar, and that this court, as has been pointed out hereinabove upon review, should determine that the attempted imposition of the annual privilege tax upon appellant for the privilege of engaging in foreign commerce is in violation of the Commerce Clause of the Federal Constitution.

Even if the Detroit International Bridge Company were Subject to the Annual Privilege Fee, which We Deny, Nevertheless that Portion of its Capital Represented by the Bridge Structure which is Used Exlusively in Foreign Commerce, Under the Express Wording of the Taxing Statute, Should Be Excluded from the Computation of the Tax.

The Taxing Statute, Act No. 85 of the Public Acts of 1921 as amended by Act 175 of the Public Acts of 1929, Section 5, of the State of Michigan, provides that:

> "None of the capital or surplus of said corporation represented by *property exclusively used in interstate commerce* shall in any case enter into computation of the net amount of the authorized capital or the capital and surplus as the case may be, upon which the computation of the privilege fees shall be made."

This provision of the Act clearly was intended to exclude not only property exclusively used in interstate commerce but that property of a corporation which was exclusively used in foreign commerce as well. To construe the statute otherwise would be to discriminate against domestic corporations that have properties which are used exclusively in foreign commerce as compared with companies having properties used exclusively in inter-

state commerce which latter companies would derive the benefit of the exclusion clause. It might be argued that such a ruling would be in contravention of the Fourteenth Amendment to the Constitution of the United States in denying equal protection of the laws.

If the Bridge Company is subject to this tax at all, the bridge structure consisting of land, bridge structure, equipment and all appurtenances thereto should not, under the express provisions of this Taxing Statute, have been included in the computation. As has been pointed out heretofore, the bridge structure under the ruling of the *Covington* case is an instrument of foreign commerce. It is used and operated by the Detroit International Bridge Commpany exclusivcly in this foreign commerce and for no other purpose whatever. So if the Bridge Company is required to pay this annual privilege tax, that portion of its capital stock which is represented by the bridge structure, land and necessary appurtenances thereto should, under the express wording of the statute, be excluded from the computation of the tax.

The Michigan Supreme Court, 267 Mich. 384, said at p. 387:

> "However, in determining the amount of the fee, the question whether the operation of the bridge is foreign commerce is presented because of the statutory exclusion from the computation of property used exclusively in interstate commerce. In this connection, 'interstate commerce' includes foreign commerce. *In re Detroit & Windsor Ferry Co., supra.*
>
> There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But the question under the statute is whether it is used in such commerce by plaintiff."

As has been pointed out in the first portion of our brief, the ownership and operation of this international highway bridge by appellant is engaging in foreign commerce. The Michigan Supreme Court erred in holding otherwise. Although we submit that the appellant Corporation is not subject to the corporation privilege tax at all, even if it were subject to the annual tax, in no event should the bridge property used exclusively in foreign commerce be included in the computation.

CONCLUSION

We respectfully submit that the judgment of the Supreme Court of the State of Michigan should be reversed.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

Appeal from the Supreme Court of the State of Michigan.

REPLY BRIEF OF DETROIT INTERNATIONAL BRIDGE COMPANY

The appellant, Detroit International Bridge Company, has asserted under its Assignment of Errors (1) and (2), that it is not subject to the annual privilege tax imposed by the State of Michigan. This position is based upon the contention that the State of Michigan has no power to apply the annual privilege tax upon a corporation, such as the appellant, for the privilege of doing business, when the only business which appellant corporation might do under its corporate charter is exclusively that of engaging in foreign commerce.

However, counsel for the appellee, Corporation Tax Appeal Board of the State of Michigan, in their brief

confuse the issue. The cases cited, and relied upon, by counsel for the appellee do not extend to the question of whether or not the state imposing the annual tax upon the corporation in question was vested with the power so to do. In all of the cases relied upon by appellee, the corporations either had power to do or were actually doing a local business within the taxing state. The power to impose the privilege tax was not questioned. The only issue before the court in those cases related to the method of computation. The court in those cases, relied upon by appellee, determined not that the state had power to impose the privilege tax, but rather the narrower question of whether the method of computation, the yard stick for measuring the tax and the privilege exercised, was proper or not. In the case at bar, the appellant, Detroit International Bridge Company, contends that the State of Michigan is without the power to impose the annual privilege tax upon it at all. Under Assignment of Errors (1) and (2), with which we are primarily concerned, the method of computation of the tax is not involved. That question is involved in the case at bar only if the court were to determine that the State of Michigan has the power to impose the tax upon appellant, which we deny, and is discussed in our brief under Assignment of Errors (3).

In order to clarify the issues, in view of the discussion in the brief of appellee, we believe that a concise restatement of appellant's position, distinguishing the authorities relied upon by appellee, would be helpful.

Appellant, Detroit International Bridge Company, questions the power of the State of Michigan to impose upon it the annual privilege tax for the year 1933, for the period from August, 1933, to September, 1934, prescribed under Act No. 85 of the Public Acts for 1921, as amended

by Act No. 175 of the Public Acts for 1929, Section 4, of the State of Michigan. We contend that the appellant is not subject to this tax at all. This annual privilege tax has been and must be clearly distinguished from the franchise tax imposed by the State of Michigan upon corporations upon their organization. The organization or franchise tax imposed by Section 3 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 33 of the Public Acts of 1927, of the State of Michigan, was paid by appellant corporation upon its incorporation in 1927. This organization or franchise tax (which is not here involved) was imposed for the privilege of being, or continuing to be, a corporation. It is a tax which was chargeable for the privilege of being, which belongs to the incorporators and permits the individuals to act in a corporate form in the State of Michigan. There is no other franchise or privilege tax under the laws of the State of Michigan which might be imposed upon appellant as a Michigan corporation for the privilege of *continuing to be* a Michigan corporation, as there was in the case of *Kansas City Ry. Co. v. Botkin,* 240 U. S. 227, relied upon by appellee. Once the organization or franchise tax has been paid there can be no further imposition of a franchise or privilege tax for the privilege to be or to continue to be. The proceeds of this organization or franchise tax, which appellant paid upon organization, under the Act and under the Constitution of Michigan is credited to the school fund of the State.

The annual privilege tax, Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act No. 175 of the Public Acts of 1929, of the State of Michigan (here involved), is for the privilege of doing business—for the privilege of exercising the corporate franchise. It is a tax imposed for a privilege granted to the cor-

poration, that is, for the privilege of exercising the corporate franchise (as distinguished from the privilege *to be* granted to incorporators). And the corporate franchise which the corporation is privileged to exercise is determined by its charter. The only business which appellant was permitted to do under its charter during the taxable period in question was to operate and maintain an international highway bridge—to engage in foreign commerce.

Under this statute (Act No. 175 of the Public Acts of 1929), the provisions of this tax are credited to the school fund. The Michigan Supreme Court has held that the annual privilege tax cannot, in view of the Michigan Constitution, be held to be a tax for the privilege of *being* or *continuing to be,* because if that were the nature of the tax the proceeds under the statute are payable to the general fund where taxes for the privilege of being or continuing to be must be paid, whereas the annual privilege tax (here involved) is payable to the general fund.

The nature of the annual privilege tax has been clearly defined and distinguished from the organization or franchise tax for the privilege of *being* or *continuing to be* in the case of *Union Steam Pump Sales Corp. v. Secretary of State,* 216 Mich. 261.

Thereafter in the case of *In Re G. H. Hammond Company,* 246 Mich. 179, the Michigan court held that so long as a Michigan corporation had the power under its charter to do a business within the State of Michigan it was subject to the payment of this annual privilege tax, even though it did not elect to exercise that privilege during the following year for which the tax was payable. After the *Hammond* case the annual privilege tax was amended by Act No. 175 of the Public Acts of Michigan for 1929, Section 4, so as to specifically provide what the court had

declared the law to be in the *Hammond* case. The following additional language was added to the statute in the 1929 amendment:

> "It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

Thereafter the Michigan court in the case of *Cobbs & Mitchell v. Corporation Tax Appeal Board,* 252 Mich. 479, and this court in the case of *People of the State of Michigan v. Michigan Trust Co.,* 286 U. S. 334, followed the rule of the *Hammond* case and the statutory amendment of 1929.

It is now established law that the annual privilege tax here involved is imposed upon a domestic corporation for the privilege of "exercising its franchise and of transacting its business within the State", and if a Michigan corporation has power to do a local business it is subject to this annual privilege tax, even though it does not elect to exercise that privilege during the taxable period.

However, the *Michigan Trust Co.* case, the *Hammond* case, the *Cobbs & Mitchell* case and the 1929 statute, with its new amendment, do not have application in the case at bar, because the appellant corporation does not have the power under its corporate charter to do a local business at all. The only franchise which appellant corporation has the power to exercise is that of operating and maintaining an international highway bridge, which is the power or privilege to engage in foreign commerce. It has no other franchise or privilege which it might exercise, and to impose a tax upon appellant corporation for the

privilege of exercising the only franchise which it might exercise, that is, to engage in foreign commerce, is to impose a tax upon appellant for the privilege of engaging in foreign commerce, which is in violation of the Commerce Clause of the Federal Constitution.

The *Michigan Trust Company* case would only have application if the appellant, Detroit International Bridge Company, in the case at bar had power to do a local business, regardless of whether appellant exercised that privilege or not. Under its corporate charter appellant has no power to engage in any other business, but that of operating and maintaining an international highway bridge, that is to engage in foreign commerce. As has been pointed out in our first brief in this case, at page 46, this court in the case of *Anglo-Chilean v. Alabama,* 288 U. S. 218, distinguished that case from the *Michigan Trust Company* case on the ground that the Alabama statute was imposed upon the actual doing of business in Alabama, while under the Michigan statute, the annual privilege tax was imposed for the privilege of doing business whether that privilege was exercised or not. This basis for distinguishing those two cases does not govern in the case at bar. The appellant corporation has no power to do a local business and therefore it cannot be subjected to a tax for a privilege which it cannot exercise under its corporate charter, just as the corporation in the *Anglo-Chilean* case could not be subjected to a privilege tax for the doing of business when it never engaged in business in Alabama. If the appellant corporation in the case at bar had the power to engage in a local business as did the corporation in the *Michigan Trust* case, the *Anglo-Chilean* case might be distinguished. However, since appellant can engage in no local business it cannot be subjected to the tax for the privilege of doing a local

business, which privilege it has not the power to exercise under its corporate charter. In view of these facts in the case at bar, the *Anglo-Chilean* case is strong authority in support of appellant's position.

APPELLEE'S THEORY NOT APPLICABLE TO CASE AT BAR

Appellant contends that the State of Michigan has no power to subject it to the annual privilege fee here involved. Counsel for the appellee do not treat with this question at all. The cases cited by Counsel for the appellee treat with questions of computation or measurement of privilege taxes where the power of the State to impose the tax is not involved. The cases cited on this question by the appellee have no present application. We admit that under the cases of *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Educational Films Corp. of America v. Ward*, 282 U. S. 379; *Pacific Co. v. Johnson*, 285 U. S. 480; and *Home Insurance Co. v. New York*, 134 U. S. 594, that a state may impose an annual privilege tax upon a domestic corporation having *power* to do a local business within the taxing state, and include in the computation of the privilege tax items of property or income which of themselves are otherwise exempt and not subject to a direct property tax by the state (such as tax exempt bonds, royalties from copyrights granted by the United States, and income from tax exempt property where the computation is based upon income) as a means of measuring the privilege enjoyed or granted. The court in those cases pointed out that the tax involved was a privilege tax and was not a direct property tax, that the inclusion of otherwise tax exempt property was merely a yard stick to measure the privilege which is being taxed, but that the items themselves were not being taxed as property. Those cases only

have application where the corporation taxed has some power to do a local business and the privilege to engage in this local business may indisputably be taxed by the state. The question involved in those cases was merely the propriety of the method of computing or measuring the privilege which is being taxed.

In the case at bar, we are not primarily concerned (under Assignment of Errors (1) and (2))with the method of computing or measuring the tax. We contend on behalf of the appellant corporation that it has no privilege of doing a local business, and the only power which it may exercise under its corporate charter is that of engaging in foreign commerce, which is neither grantable by the State of Michigan, nor taxable by it.

The case of *Kansas City Ry. Co. v. Botkin,* 240 U. S. 227, has no application in that the tax there involved was for the privilege of being or continuing to be a corporation (distinguished from the case at bar where the annual privilege tax is for the privilege of doing or exercising the corporate franchise). And furthermore the question there involved was not primarily the power of the state to impose the tax, but rather the method of computing the tax. The computation of the tax in the *Kansas City v. Botkin* case was made upon paid-up capital and surplus, part of which represented investments in property and roads out of the state upon which the state could not impose a direct property tax. This court held in that case that the inclusion of this capital and surplus was merely a means of measuring the privilege granted and was not a direct tax upon the property used in business out of the state or in interstate operations.

The case of *United States Glue Co. v. Oak Creek,* 247 U. S. 321, is based upon similar reasoning to the other

above cases relied upon by appellee. In this case the State of Wisconsin imposed an annual privilege tax upon a domestic corporation for the privilege of doing business, computing or measuring that privilege by the net profits derived from its business intrastate and interstate. The corporation had the power to do a local business under its charter, and did engage in a local business. The court in that case held that since the state had the power to impose an annual privilege tax upon the domestic corporation for the privilege of engaging in a local business that the state might measure this privilege and compute the tax by all of the income of the corporation. The court held that the tax was not a direct tax upon the interstate or out-of-state commerce, or upon property used in connection therewith, but was merely a measure to determine the privilege granted and taxed. The state there had the power to impose the tax upon the corporation since the corporation had the corporate power under its charter to engage in a local business. The question determined by the court was the validity of the method of computing the tax for the privilege granted. In the case at bar, we submit that appellant corporation has no power to engage in a local business, and since the only power which is does have under its corporate charter is one which would permit it to engage in foreign commerce it cannot be subjected to a privilege tax for this privilege by the State of Michigan.

The cases of *Hump Hairpin Co. v. Emmerson*, 258 U. S. 290, *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, and *National Leather Co. v. Massachusetts*, 277 U. S. 413, also involved the method of computing the privilege tax where a state, however, applied the tax to foreign corporations. In all of these cases, the court has held that it is proper for the taxing state to include

in the computation of this privilege tax interstate income or net profits derived without the taxing state so long as the method of prorating or allocating the percentage which is attributable to the taxing state is fair and equitable. In each of these cases the foreign corporations were engaged in a local business within the taxing state, and there is no question directed to the power of the state to impose the tax. Only the method of measuring or computing the tax was involved. In the case at bar, appellant questions the power of the State of Michigan to apply the tax to it at all.

Both the Michigan Supreme Court, below, and the appellee rely upon the decision in the case of *In Re Detroit & Windsor Ferry Company*, 232 Mich. 574, in which are cited many of the cases relied upon by the appellee, discussed hereinabove and distinguished from the case at bar. As was pointed out in our first brief on pages 53-56, the decision in the *Detroit & Windsor Ferry Company* case might be supported on the grounds that in that case the Michigan corporation there involved had the power to do a local business and did engage in a local business. All of its property was located within the State of Michigan. And since the Detroit & Windsor Ferry Company had the power to do a local business under its charter, the State of Michigan could impose the annual privilege tax upon this privilege to engage in a local business, even though the corporation also engaged in foreign commerce.

To measure this privilege to do business within the State of Michigan, the state could include in the computation all of the capital and surplus of the Detroit & Windsor Ferry Company, even though some of the property was used at times in foreign commerce. The tax was not there imposed directly upon the property which sometimes was used in foreign commerce, but that prop-

erty was merely included in the computation to measure the privilege taxed, that is the privilege of doing a local business which the corporation had the power to do under its charter. In that connection, many of the above cases now relied upon by appellee were cited by the court, and properly so, in the *Detroit & Windsor Ferry Company* case.

However, that case is clearly distinguishable from the case at bar in that appellant, Detroit International Bridge Company, in the case at bar has no power under its charter to do a local business, and, therefore, the State of Michigan has no power to impose an annual privilege tax for the privilege of doing a local business. Nor can the State impose this tax upon appellant for the privilege of engaging in foreign commerce. And since the state has no power to impose the tax, the above authorities cited in the *Detroit & Windsor Ferry Company* case and now relied upon by appellee have no application, because they all deal with questions having to do with the method of computation of the tax rather than the power of the state to impose the tax.

But when the Michigan Supreme Court in its decision in the case at bar, below, cites the *Detroit & Windsor Ferry Company* case in support of the proposition that the State of Michigan would have the power to impose a tax upon the Detroit & Windsor Ferry Company even if the only power granted to the corporation there under its charter were to engage exclusively in foreign commerce, and refuses to distinguish that case from the case at bar because in that case the corporation had power to do a local business, that position cannot be sustained by the authorities any more than can the case at bar.

It is the position of the appellant that the State of Michigan is without power to impose this annual privilege tax

for a privilege which the appellant has no power to exercise. To impose the tax would be to violate the Commerce Clause of the Federal Constitution and would be contrary to the decision of this court in the cases of *Philadelphia Steamship Co. v. Pennsylvania,* 122 U. S. 327, and *Ozark Pipe Line Co. v. Monier,* 266 U. S. 555.

Counsel for appellee in their brief argue that appellant by voluntary action has amended its Articles of Incorporation and limited its purpose clause and its powers in an attempt to avoid the imposition of the annual privilege tax. Under the Articles of Incorporation of appellant as originally filed on June 21, 1927, the power of the Company was limited solely to the construction, ownership and operation of this international highway bridge (R. 19). A few months later Article III of the Articles of Incorporation of the appellant was amended so as to expressly provide for the acquisition and maintenance of real estate, which it believed were purely *incidental* powers of any corporation, without extending the primary purpose of owning, operating and maintaining this international highway bridge (R. 19, 22). Appellant then contended that these powers were merely incidental to the primary purpose, and in the case before this court, 287 U. S. 295, counsel for the Corporation Tax Appeal Board for the first time disputed this contention of appellant, and this court at that time did not consider the case on the merits, and stated that appellant had "failed to establish that it had no power to carry on any business that is not within the protection of the Commerce Clause". Those proceedings and the proceedings in the case at bar are carried up by certiorari from the Corporation Tax Appeal Board to the Supreme Court of Michigan. The statement of facts contained in the petition for the writ of certiorari on that appeal, which are not disputed, must be accepted as true.

However, in order to obviate any such contention again being raised, the appellant amended the purpose clause of its Articles of Incorporation on May 3, 1933, limiting the power of the corporation to the ownership and maintenance of this international highway bridge, in substance similar to the purpose clause in the original articles of association (R. 7). The corporation has no other power or purpose whatsoever. This is indisputable. This fact was clearly set forth in appellant's petition for writ of certiorari to the Supreme Court of Michigan, paragraph (3) (R. 2), and appellee has at no time in the proceedings contended to the contrary.

It is the sole purpose and power of appellant to operate and maintain this international highway bridge. Under the Corporation Laws of Michigan, the corporation may amend its Articles even though by so doing it no longer seeks to engage in a local business. A Michigan corporation may by appropriate vote amend its Articles of Association. It may reduce its capital structure when the original authorized and outstanding stock is no longer required, even though the corporation by this voluntary action reduces its annual privilege tax. The Secretary of State and appellee have never contended to the contrary. Nor is there anything unholy about appellant's amending its Articles so as to give up a power to do a local business (if appellant ever had such a power, which we deny) when appellant neither requires or seeks to exercise such power, even though by so doing the annual privilege tax is avoided. As the Michigan court said in the case of *Auditor General v. Bassett's Estate*, 246 Michigan, 440, at page 449:

> "On the other hand, it is lawful for a person to use such means as the law provides for the

purpose of reducing the burden of his taxes, if the means be not a mere subterfuge to defeat proper and valid assessment."

Appellant cannot be subjected to the payment of a tax, which was payable in advance, in August of 1933, for the period to September 1934 (*In Re Johnston Newton Co.*, 226 Mich. 40), for the privilege of doing a local business when it did not either seek or have the power under its charter to do a local business during the taxable period in question.

Nor does Section 10 of Act No. 327 of the Public Acts of Michigan for 1931 (General Michigan Corporation Code), referred to on pages 7-9 of counsel for appellee's brief, extend the corporate powers so as to permit it to engage in a local business which is not purely incidental and necessary to the carrying out of the foreign commerce. As has been pointed out on pages 53-54 of our brief, a corporation only possess the right to engage in such business operations as are expressly enumerated in its charter or Articles of Incorporation. The Michigan decisions (cited in our brief) have confined the operations of a corporation to these enumerated powers to the exclusion of other powers. The powers set forth in Section 10 of the General Corporation Law are not local powers which appellant may exercise apart from the general purpose of the corporation. Section 10 does not extend the purpose or powers of appellant corporation but only expressly states, what has generally been the law, that these incidental powers may be exercised incidentally to and in furtherance of the purpose of the appellant corporation as specified and limited in its Articles of Incorporation. Under its charter appellant can only operate and maintain this international highway bridge from Detroit to Canada,

that is to engage in foreign commerce, and the incidental powers mentioned in Section 10 can only be exercised in furtherance of the purpose limited in and the power granted under its Articles of Incorporation. Appellee does not and cannot seriously contend otherwise.

CONCLUSION

We respectfully submit that the State of Michigan is without power to impose the annual privilege tax here in question upon Detroit International Bridge Company, the appellant, for the privilege of exercising its corporate franchise and doing business within the State since the appellant under its corporate charter has no power to engage in a local business and is limited thereunder to the operation and maintenance of an international highway bridge, which is engaging in foreign commerce. For the State of Michigan to impose this tax upon appellant is to impose a tax upon appellant for the privilege of engaging in foreign commerce. We respectfully submit that the Judgment of the Supreme Court for the State of Michigan should be reversed.

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Detroit International Bridge Company.

Supreme Court of the United States

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

Appeal from the Supreme Court of the State of Michigan.

MEMORANDUM AFTER ORAL ARGUMENT

At the oral argument on Friday afternoon, questions in various forms from Mr. Chief Justice Hughes, Mr. Justice Stone and Mr. Justice Roberts were directed to the proposition of whether it was the position of the Appellant that

THE STATE HAS NO POWER TO IMPOSE AN ANNUAL PRIVILEGE TAX (SUCH AS MICHIGAN ATTEMPTS TO HERE IMPOSE) UPON A DOMESTIC CORPORATION WHEN THE BUSINESS OF THAT CORPORATION LIMITED BY THE PURPOSE CLAUSE OF ITS CHARTER, IS EXCLUSIVELY THAT OF FOREIGN COMMERCE.

It is the position of the Appellant that no state has such power. At the risk of repetition, with a view of making clear and substantiating our position, this added Memorandum is submitted.

Appellant upon incorporation in 1927 paid the incorporation tax imposed by a different provision of the statute than is here involved. That tax is for the privilege of being—existing as a corporation. It is a privilege granted to individuals to do the business specified in the charter in a corporate capacity. There is no other statutory provision of Michigan for a further imposition of a tax for the privilege of existing, being, continuing to exist or be. The Michigan court has recognized and made this distinction between the organization (franchise) tax and the annual tax for the privilege "to do". *Union Steam Pump Sales Corp. v. Secretary of State,* 216 Mich. 261.

The annual privilege tax in question, in the case at bar, is an annual privilege tax chargeable to the Corporation (not to the incorporators or stockholders) "for the privilege of exercising its franchise and of transacting its business within the State." (See statute here involved, pages 10 and 11 of our first Brief.) In other words, the tax is imposed for the privilege of the corporation doing the business for which organized or which is permitted under its charter. Where the corporation is permitted to do a local business, then it is required to pay for the privilege of doing this business, even though it never elects to exercise this particular privilege. However, where the corporation, as in the case at bar, is limited in its purpose to engaging exclusively in foreign commerce and has no power to do a local business, a state is without power to impose an annual privilege tax upon it for the privilege of doing a local business within the state when under its corporate charter it is not permited to engage in a local business. Mr. Justice Roberts inquired whether there were any authorities in support of this proposition, and we responded that there were no Michigan authorities, and that this is the first case dealing with this question in Mich-

igan. We should have also added that the United States Supreme Court has several times announced the very rule which we here submit should again be followed in the case at bar.

In the case of *Philadelphia & Southern Steamship Co. v. Pennsylvania,* 122 U. S. 327, a domestic corporation was engaged exclusively in interstate commerce (as the Appellant in the case at bar is engaged exclusively in foreign commerce), carrying people from the shores of one state over a navigable stream to the shores of another state. The State of Pennsylvania attempted to impose an annual tax upon the corporation, which the Attorney General for the State of Pennsylvania contended was an annual privilege tax on the franchise of doing business. The tax was held invalid, the court saying at page 342 as follows:

> "If intended as a tax on the *franchise of doing business*—which in this case is the business of transportation and carrying on interstate and foreign commerce it would clearly be unconstitutional. It was held by this Court in the case of *Gloucester Ferry Company v. Pennsylvania,* 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals."

The Attorney General for Pennsylvania further contended, that although a privilege tax could *not* be imposed upon a foreign corporation which was engaged exclusively in foreign commerce, nevertheless it might be imposed upon a domestic corporation which derives its franchise to be a corporation from the taxing state. A like argument is made by Appellee in the case at bar. In other words it is contended by the Attorney General for the State of Michigan that since the Appellant derives its franchise

to be a corporation from the State of Michigan, the State of Michigan might further impose this annual tax upon it for the privilege of exercising that franchise to do business permitted by its charter, even though that business be exclusively that of foreign commerce. The United State Supreme Court has held that this theory submitted by the Attorney General of Michigan cannot be sustained, saying in the *Philadelphia & Southern Steamship Company* case, at page 344:

> "The decision in this case and the reasoning on which it is founded so far as they relate to the taxation of interstate commerce carried on by corporations, *apply equally to domestic and foreign corporations.* No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are *exercising a franchise.*"

A similar rule was recently announced by this court in the case of *Ozark Pipe Line Corp. v. Monier,* 266 U. S. 555. In that case a foreign corporation was involved. It became domesticated in the State of Missouri, and in obtaining its license to do business in Missouri, it was stated that the business which it would engage in in Missouri was exclusively to carry crude oil from one state through Missouri to another state, which was exclusively the business of interstate commerce. It was contended by the Attorney General that since this foreign corporation had domesticated in Missouri that it in fact obtained a franchise in Missouri like that granted to a domestic corporation, and, therefore, it could

be subjected to an annual privilege tax for exercising this franchise (a tax similar to that involved in the case at bar), even though that corporation engaged in no local business in Missouri and engaged exclusively in interstate commerce. This court held this contention without merit and held the tax invalid, Mr. Justice Sutherland speaking for the court in this connection saying at page 562:

> "The tax is one upon the privilege or right to do business, *State Ex rel v. State Tax Commission*, 282 Mo. 213, 234; *and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed.* It long has been settled that a State cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on."

And at page 567:

> *"Nor is it material that appellant applied for and received a Missouri license* or that it had the power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the State an authority, denied by the Federal Constitution, to regulate interstate commerce. *The State has no such power even in the case of domestic corporations.* See *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, 342. The statute as applied to appellant is unconstitutional."

For a further discussion of this point see our first Brief, pages 47-52.

Supplementing the discussion of the *Detroit & Windsor Ferry Company* case in our Brief on pages 53-56, and our Reply Brief, pages 10, 11, attention should be called to the statement of the Michigan court, below, that the hold-

ing in the *Detroit & Windsor Ferry Company* case was not based upon the fact that corporation in that case had local powers. In making that statement, the Michigan court undoubtedly had overlooked its position taken in the case of *In Re G. H. Hammond Company,* 246 Mich. 179, in which it distinguished the *Detroit & Windsor Ferry Company* case from the *G. H. Hammond Company* case on the very ground that the Detroit & Windsor Ferry Company actually engaged in and had power to engage in a local business, saying at page 184 in the *G. H. Hammond Company* case as follows:

> "They also cited to that effect *in re Johnston-Newton Co.,* 226 Mich. 40, and *In re Detroit & Windsor Ferry Co.,* 232 Mich. 574. The question now under consideration was not raised in any of those cases. *In each of them the corporation was admittedly doing business in Michigan,* and the question of the application of this statute to a domestic corporation not doing business in Michigan was in no way involved."

The determination of the Michigan court as to whether the application of the Michigan tax in the case at bar violates the Federal Constitution is not binding upon this court as to the constitutional question involved. *New Jersey Bell Telephone Co. v. State Board of New Jersey,* 280 U. S. 338, 346; *Macallen Company v. Massachusetts,* 279 U. S. 620, 625; *Educational Films Corp. v. Ward,* 282 U. S. 379, 387, 388.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM.

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leave to appeal to the United States Supreme Court from the judgment entered by the Supreme Court of the State of Michigan, on June 4, 1934, sustaining the opinion of the Corporation Tax Appeal Board of Michigan in favor of the validity of the statute. (Act No. 85, Public Acts of 1921, as amended by Act No. 175, Public Acts of 1929.) The order allowing the appeal was signed and entered by the Chief Justice of the Supreme Court of the State of Michigan on July 2, 1934.

Statement of the Case.

The Detroit International Bridge Company, appellant, in its statement of points intended to be relied upon, filed with this Court, sets forth three assignments of error.

I. (a) That Act No. 85, Public Acts of 1921, as amended by Act No. 175, Public Acts of 1929, of the State of Michigan, is constitutional in application to appellant and its business.

(b) That said Act so far as applied to appellant does not violate Article I, Section 8, Clause 3, of the Constitution of the United States.

(c) In applying said statute and imposing the privilege fee for the year 1933, upon appellant, the State of Michigan did not unduly interfere with and thereby usurp the power of Congress of the United States to regulate such foreign commerce as is provided by Article I, Section 8, Clause 3, of the Constitution of the United States.

II. The tax imposed by Section 4 of said Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, not being imposed on the privilege to be a corporation (such tax being imposed by Section 3 of said Act No. 85 of the Public

Acts of 1921, as amended by Section 3 of Act No. 175 of the Public Acts of 1929), but being imposed on the privilege to do the business for which organized and such business of the plaintiff being solely and exclusively the maintenance and operation of an instrumentality of foreign commerce, viz., an international highway toll bridge, such privilege (as distinguished from the privilege to be organized as a corporation with power to do such business if permitted by the competent authority) is not grantable by or otherwise within the competency of the State of Michigan, but is solely within the jurisdiction of Congress under Article I, Section 8, Clause 3, of the Constitution of the United States and the Supreme Court of the State of Michigan erred in not holding said Section 4 of said Act not applicable to plaintiff and its business or not valid under said provision of the United States Constitution if so applied.

III. Under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, it is provided that in computing the annual privilege fee imposed upon corporations that property used exclusively in foreign commerce be excluded from the computation of the tax; that even if the imposition of said tax upon petitioner and plaintiff in error is proper (which we deny), the Supreme Court of the State of Michigan erred in not excluding from the computation of said tax the property of the petitioner and plaintiff in error, which is used exclusively in foreign commerce.

No Federal Question Involved.

It is the contention of the Corporation Tax Appeal Board of Michigan, appellee, that the United States Supreme Court is without jurisdiction to review on appeal the judgment entered by the Supreme Court of the State of Michigan on July 2, 1934, under the provisions of the Judi-

cial Code, Section 237 (U. S. C. A. Title 28, Section 344) for the reason no Federal question is involved. In support of this contention appellee cites the following cases:

Henderson Bridge Company v. *Kentucky*, 166 U. S. 150;

Kansas City F. S. & M. Ry. Co. v. *Botkin*, 240 U. S. 227, 60 L. Ed. 617;

Arkansas and Memphis Railway Bridge and Terminal Company v. *State*, 295 Southwestern 378 (Arkansas) 275 U. S. 548, (certiorari having been denied by the Supreme Court, 275 U. S. 548);

Nebraska Ex Rel Beatrice Creamery Co. v. *March*, 282 U. S. 799.

Article 4 of the Michigan Tax Law Is Not Unconstitutional in Its Application to Appellant.

The question involved in this issue represents the validity of a Michigan statute, Act 85, Public Acts of 1921, as amended by Act 175, Public Acts of 1929, which appellant contends is unconstitutional in its application to the Bridge Company. Pertinent provisions of the statute:

> "Sec. 4. Privilege fee, Basis of. Every corporation organized or doing business under the laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every

> corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

The Detroit International Bridge Company, a Michigan corporation, organized in 1927, paid its initial franchise fee to bring into being a corporation. This initial fee is paid but once and is distinguished from the privilege fee, which represents an annual tax imposed upon

> "Every corporation organized or doing business under the laws of this state * * *"

and exacted for

> "The privilege of exercising its franchises and of transacting its business within the state." (Sec. 4, *supra.*)

Upon the completion of the Bridge in 1929. appellant claimed exemption from the payment of the privilege tax because its powers were limited to the operation of the Bridge which constituted foreign commerce and that the imposition of the tax by the State of Michigan would violate Article I, Section 8, Clause 3, of the Constitution of the United States. This question was raised by appellant involving the constitutionality of the statute, for the year 1930. see *In Re:*

Detroit International Bridge Company, 257 Michigan 52.

Said appeal was taken from a decision by the Tax Appeal Board sustaining and upholding the decision of the Secretary of State in denying the exemption of appellant. The Michigan State Supreme Court sustained the Corporation Tax Appeal Board in its holding. Thus holding valid in its application to appellant, Act 85, Public Acts of

1921 as amended. The identical questions raised in this issue were before the State Supreme Court in the original case of 1930, and the State Supreme Court after discussing the questions involved, in its decision said in part:

> "We are impressed that in the discussion of this matter counsel lose sight of the nature of the privilege fee sought to be collected. It is not a tax upon the proceeds of the business of the corporation. It in no way involves the tolls collected from those using the bridge as a means of transportation between Detroit and Canada. It is a fee imposed by law 'for the privilege of exercising its franchise and of transacting its business within this State.' 'The distinction between such a fee and a tax upon property was clearly pointed out in *Union Steam Pump Sales Co.* v. *State*, 216 Mich. 261, and later *In Re Truscon Steel Co.*, 246 Mich. 174, and *In Re G. H. Hammond Co.*, 246 Mich. 179. The question presented is so clearly disposed of *In Re Detroit & Windsor Ferry Co.*, 232 Mich. 574, that further discussion seems unnecessary.' "

An appeal was taken from the Supreme Court of Michigan in the case, *supra*, to the Supreme Court of the United States

> *Detroit International Bridge Company* v. *Corporation Tax Appeal Board*, 287 U. S. 295,

and because appellant failed to establish it had no power to carry on any business that was not within the protection of the commerce clause, the constitutional question involved was not decided by this Court. Appellant had argued the additional purposes were merely incidental to the main purposes.

The Bridge Company amended its articles in May of 1933, and the purposes of the corporation are as follows:

> "To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit,

Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

"To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

In submitting to the State its annual report for 1933, the Bridge Company enclosed a check for $2.00 filing fee but claimed exemption as to the privilege fee, stating it had power only to engage in foreign commerce and claiming imposition by the State of the privilege tax would violate the Constitution of the United States. The Secretary of State disallowed the claim of appellant and the matter was appealed to the Corporation Tax Appeal Board which in turn upheld the Secretary of State. An appeal was taken to the State Supreme Court entitled:

Detroit International Bridge Company v. *Corporation Tax Appeal Board,* 267 Mich.—case not yet printed in Advance Sheets.

The identical questions were again presented to the Supreme Court as in the original case and again our State Supreme Court declared the law constitutional in its application to appellant. The court said in part:

"Plaintiff now claims that, under its charter, it can do no intrastate business, its only corporate power is to operate the bridge, such operation is foreign commerce and, therefore, the privilege fee is a burden upon such commerce and contravenes the Federal Constitution.

"We need not inquire whether plaintiff has any intrastate power under statutes regulating domestic corporations. Nor whether maintenance of the bridge is local business. Nor need the multitude of cases deal-

ing with taxation and regulation of interstate and foreign commerce be analyzed or distinguished. In plaintiff's former case and *In re Detroit & Windsor Ferry Company*, 232 Mich. 574, where this court held that the fee is not a direct burden on foreign commerce, the fact that the corporations had local powers was not given weight. These cases are determinative upon plaintiff's liability for the fee.

"However, in determining the amount of the fee, the question whether the operation of the bridge is foreign commerce is presented because of the statutory exclusion from the computation of property used exclusively in interstate commerce. In this connection, 'interstate commerce' includes foreign commerce. *In re Detroit & Windsor Ferry Company, supra.*

"There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But the question under the statute is whether it is used in such commerce by plaintiff.

"Plaintiff conveys no persons or goods across the bridge or international boundary line. It merely collects tolls from such pedestrians or vehicles as use it. It provides an instrumentality which others may use in conducting foreign business." • • •

And the court proceeds to distinguish cases cited by appellant and concludes by stating:

"In our opinion, the fact that plaintiff carries no persons or goods across the international line is determinative that it is not engaged in foreign commerce and its property is not so used by it."

Appellant, the Detroit International Bridge Company, as a Michigan corporation, is liable for the privilege tax, 1st: because it is *organized* under Michigan Law, (see Section 4, *supra*), 2nd: because it has the *privilege* and *right* to exercise its corporate franchise and for this *right* the State is seeking to exact a privilege tax. The Bridge Company is still holding authority to do business in Michi-

gan and has held such authority during the entire period covered by the privilege tax. It is apparent, therefore, that the State of Michigan is not attempting to tax the Bridge Company for business which it has transacted or is about to transact in Michigan. On the other hand, it is attempting to tax appellant for the *existence* of a *right* and not the *exercise* of the right. Regarding the case in this light it is manifest that this suit presents no Federal question.

Since the tax in this case is on the *right* to do business and the amount of the tax may lawfully be computed on the value of the property although used in foreign commerce, it is obvious that the method employed by the State of Michigan cannot be questioned by this Court as being a burden upon foreign commerce or in violation of Article I, Section 8 of the Constitution of the United States. In support we cite the following cases:

Flint v. *Stone Tracy Co.*, 220 U. S. 107.
Ashley v. *Ryan*, 153 U. S. 436.
Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217.

We respectfully submit that the judgment of the Supreme Court of the State of Michigan upholding the constitutionality of the statute was decided clearly in accord with the decisions, *supra*, of this Court applicable to the Federal question involved, and should be affirmed. The appeal should be denied.

PATRICK H. O'BRIEN,
Attorney General of the State of Michigan,
Attorney for Appellee.
ALICE E. ALEXANDER,
Of Counsel.

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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1934

NO. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLEE, CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

STATEMENT OF FACTS

Appellant is a corporation organized under the laws of the State of Michigan primarily for the purpose of constructing, maintaining and operating an international bridge between Detroit, Michigan, and Sandwich, Ontario, Canada, and collecting tolls for its use.

It paid its initial organization or franchise fee to the State for the purpose of coming into existence and with the acceptance of its corporate franchise accepted the liability of the annual privilege tax provided by Section 4, of Act 85, Public Acts of 1921, as amended.

The Bridge Company paid its privilege fees for the years 1927 and 1928. In 1929 it tendered its annual report accompanied by the minimum privilege fee of $10.00, claiming among other things, exemption of the value of the bridge structure due to its use in foreign commerce. Later Appellant withdrew this claim admitting its liability to the tax inasmuch as the bridge was under construction and not open to the public, thereby disclaiming it was engaged in carrying on commerce.

The 1930 annual report was submitted together with check in the amount of $147.92 to cover $2.00 filing fee and $145.92 privilege fee. Appellant, in said report, raised the claim for exemption on several different issues including the constitutional question which is here on appeal in the case at bar. The other issues raised in said case, all of which were disallowed by the Appeal Board, are not important in this case. The Bridge Company appealed from the determination of the Tax Appeal Board to the State Supreme Court and argued before said Court the invalidity of Michigan's so-called Privilege Tax Law in its application to Appellant. Judgment was entered sustaining the determinaion of the tax by the Corporation Tax Appeal Board thus sustaining and upholding the validity of Michigan's so-called Tax Law. See:

DETROIT INTERNATIONAL BRIDGE COMPANY vs. CORPORATION TAX APPEAL BOARD, 257 MICH. 52.

An appeal was taken to this Court and the case argued

in the October Term, 1932. Judgment was entered confirming the judgment of the State Supreme Court. The same question which is presented in the instant case was before this Court in the former case. See:

DETROIT INTERNATIONAL BRIDGE COMPANY vs. CORPORATION TAX APPEAL BOARD, 287 U. S. 295.

The Court in passing upon the issue presented did not consider the question as to whether Appellant was engaged in foreign commerce and said in part:

> "• • • we are of the opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause".

Appellant argued before this Court, the Bridge Company was without power or authority under its charter to do any other than a commerce business, although the amended Articles of Incorporation specified various purposes. Subsequent to the decision of this Court, Appellant amended its Articles of Incorporation and eliminated its avowed incidental purposes, thereby claiming it is now restricted by its charter to carrying on of foreign commerce. The present amended purposes read:

> "To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.
>
> "To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use".

Thus by its voluntary action—that of amending its Articles of Incorporation—Appellant imposes restrictions which it now claims as a proper defense in its attempt to invalidate the Privilege Tax Law. It will be noted the Bridge Company *exercised its franchise* in amending its Articles. It still retains the power to amend and enlarge its purposes at will which we contend, is a valuable right and which unquestionably should make Appellant subject to the Tax Law. Surely it was not the intention of the framers of the Michigan statute that its effectiveness should be made subject to such mere caprice. The Bridge Company still possesses its *right* to *exercise* its *corporate franchises* in Michigan and is using its franchise in carrying on its business through its Detroit offices. Under the Bridge Company's charter granted to it by the State it is in possession of all the powers granted by this State to subjects of its creation. (See Section 10, Act 327, Public Acts of 1931), Supra.

Subsequent to the filing of said amendment on August 30, 1933, the Bridge Company submitted its annual report to the State for the year 1933, enclosing its check for $2.00 filing fee, claiming exemption from the imposition of the privilege tax stating it was now *indisputable* the only power the corporation had was to engage in and carry on foreign commerce and therefore it was without liability as to the privilege tax and further claiming the imposition of such a tax by the Secretary of State would contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States.

The Secretary of State disallowed the claim of Appellant and computed the privilege tax upon its paid-up capital of $1,505,300.00 @ 2½ mills, amounting to $3,763.25. The amount was not paid. Appellant filed an appeal to the Corporation Tax Appeal Board and said Appeal Board sustained the Secretary of State in his

determination of the fee. The case was then appealed to the Supreme Court of the State of Michigan to review the determination of the Tax Appeal Board and the constitutional question here present was argued before the Michigan State Supreme Court—that of the validity of Michigan's Tax Law in its application to Appellant. The State Court upheld and sustained the corporation Tax Appeal Board in its determination of the tax, and declared its tax law valid in its application to Appellant. See:

DETROIT INTERNATIONAL BRIDGE COMPANY vs. CORPORATION TAX APPEAL BOARD, 267 Mich. 384. (Advance Sheets)

Judgment was entered by the State Supreme Court on June 4, 1934. On June 29, 1934, the Bridge Company, by its counsel, filed in the Supreme Court of Michigan, an application for Leave to Appeal to this Court from the judgment of the State Supreme Court. The order allowing the appeal was signed and entered by the Chief Justice of the State of Michigan on July 2, 1934.

It is conceded by counsel for Appellant that the tax assessed against it was assessed in exact accordance with the provisions of the statute.

ISSUE

Two questions are presented in this issue:

I. Is the imposition of the privilege tax in its application to Appellant a violation of the Commerce Clause of the United States Constitution?

II. Is the Bridge Company engaged in foreign commerce?

MICHIGAN STATUTES INVOLVED

The privilege fee here claimed was imposed by the State of Michigan in accordance with the provisions of Act 85, Public Acts of 1921, as amended by Act 175, Public Acts of 1929, and provides in part as follows:

> "Sec. 4. Every corporation organized or doing business under the laws of this State, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the *privilege of exercising its franchise* and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. * * *". (Act No. 233 P. A. 1923). (Italics are ours).

This same section amended by Act 175, Public Acts of 1929, reads as follows:

> "It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, *having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.*" (Italics are ours).
>
> "Sec. 5. * * *None of the property or capital of

any corporation subject to paying the privilege fee prescribed in section four which is located without the state of Michigan, and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation of the net amount * * * or the capital and surplus, as the case may be, upon which the computation of the privilege fees shall be made: * * *".

Section 82, of Act 327, Public Acts of 1931, which provides for contents of annual report requires among other things:

"(m) A complete and detailed statement of the assets and outstanding liabilities of the corporation at the close of business on the thirty-first day of December or upon the date of the close of its fiscal year, next preceding: Provided, That every corporation organized on or after January first and prior to August thirty-first of any one year, and every foreign corporation admitted to do business subsequent to January first and prior to August thirty-first of any one year shall file a report showing the condition of its business on the date of its incorporation or admittance, with a filing fee of two dollars and a privilege fee of ten dollars.

* * *

(o) Such other information and facts as the secretary of state may demand and need for the purpose of computing the annual privilege fee provided by law."

Section 10, of same Act provides:

"POWERS. Every corporation, unless otherwise provided, or inconsistent with the act under which a particular corporation is or shall have been formed, shall have power:

a—to have succession, by its corporate name for the term stated in its articles;

b—to sue and be sued, complain and defend, in any court of law or equity or to be a party to any proceedings before any board or commission or other public body of this state or any other state or government;

c—to have a corporate seal which may be altered at pleasure and to use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise;

d—to acquire, purchase, hold, and convey real and personal estate and to mortgage or lease any such real and personal estate with or without any of its franchises, corporate or otherwise; the power to hold real and personal estate shall include the power to take the same by gift, devise or bequest;

e—to appoint such officers and agents as the business of the corporation shall require and to allow them suitable compensation;

f—to make, alter, amend and repeal by-laws for the regulation and government of its affairs, including the certification and transfer of its stock;

g—to conduct its business in this state, other states, the District of Columbia, the territories and colonies of the United States and in foreign countries and the territories and colonies thereof and have one or more offices out of this state and to acquire, purchase, hold, mortgage, pledge, assign, transfer and convey real and personal property out of this state, provided such powers are not specifically denied in the objects set forth in its articles;

h—to acquire, purchase, hold, sell and transfer shares of its own capital stock: Provided, That no corporation shall use its funds or property for

the purchase of its own shares of capital stock when such use would cause any impairment of the capital of the corporation: And provided further, That shares of its own capital stock belonging to the corporation shall not be voted directly or indirectly: And provided further, That nothing in this section shall be construed as limiting the exercise of the rights given by section thirty-seven of this act;

i—to guarantee, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidence of indebtedness created by, any other corporation or corporations of this state or any other state, country, nation or government, and, while the owner of the same, to exercise all the rights, powers and privileges of ownership including the right to vote thereon if such right be an incident of the same: Provided, That any corporation organized or doing business in this state under this act shall not have the power to guarantee or anywise become surety upon any bond or other undertaking securing the deposit of public moneys;

j—to borrow money and issue, sell, or pledge bonds, promissory notes, bills of exchange, debentures, and other obligations and evidences of indebtedness whether secured by mortgage, pledge or otherwise, or unsecured;".

SUMMARY OF ARGUMENT

I. *Section 4 of Act 85, Public Acts of 1921, as amended (the Michigan Privilege Tax Law) is not unconstitutional in its application to Appellant because of the nature of the business in which said Appellant is engaged.*

A. The States may lawfully impose an excise tax upon corporations for the *privilege* of exercising their corporate franchises or doing business within the State even though such business be foreign commerce or there be included in the measure of the value of such privilege property exempt from direct taxation.

B. The tax imposed by Section 4 of the Tax Law is a tax upon the privilege of exercising corporate franchises or doing corporate business within the State and is a true excise tax. It is not a tax upon the property or business. The net worth of the corporation (its paid-up capital and surplus) for a preceding year being used merely as the measure of the value of the future exercise of the privilege.

C. Michigan has not attempted under the guise of an excise tax to tax the business or property used exclusively in foreign commerce or the privilege of engaging in foreign commerce.

II. ***The Appellant is not entitled to the relief asked in this case assuming this Court holds the law constitutional in its application to Appellant—that of exemption of the value of the property from the computation of the tax—because of its being used exclusively in foreign commerce for the reason the Bridge Company is not engaged in carrying on commerce and its property is not so used by it.***

ARGUMENT

POINT I

A.

The States may lawfully impose an excise tax upon corporations for the privilege of exercising their corporate franchises or doing business within the State even though such business be foreign commerce or there be included in the measure of the value of such privilege property exempt from direct taxation.

This well established rule represents the universal holdings of this Court in cases where the tax was measured by the value of capital stock; by the net income of corporations, and has been held to apply to federal bonds, property in interstate commerce, patents, copyrights, and the income from such properties. See:

FLINT v. STONE TRACY CO., 220 U. S. 107
EDUCATIONAL FILMS CORPORATION OF AMERICA v. WARD, 282 U. S. 379
PACIFIC CO. v. JOHNSON, 285 U. S. 480-489
HOME INSURANCE CO. v. NEW YORK, 134 U. S. 594
KANSAS CITY, FORT SCOTT & MEMPHIS RY. CO. v. BOTKIN, 240 U. S. 227
HUMP HAIRPIN CO. v. EMMERSON, 258 U. S. 290
UNITED STATES GLUE CO. v. OAK CREEK, 247 U. S. 321, 328
UNDERWOOD TYPEWRITER CO. v. CHAMBERLAIN, 254 U. S. 113, 120
NATIONAL LEATHER CO. v. MASSACHUSETTS, 277 U. S. 413.

In FLINT v. STONE TRACY CO., supra, a federal tax on corporations imposed "with respect to carrying on or doing business" and measured by net income, was held to be an excise, not a direct tax on property or income, and to be valid notwithstanding the fact that net income from tax-exempt municipal bonds was included in the measure of the tax. This Court, after discussing the previous decisions of the Court, said:

> "There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. *The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property.*" (Italics are ours).

and the Court further said:

> "It is therefore well settled by the decisions of this Court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed."

This case is generally regarded as the leading case not only to the effect that a tax for the privilege of exercising corporate privileges measured by percentage of net income is not a property tax but also as authority to the effect that the inclusion of income from non-taxables in the net income yard-stick is legitimate. While this case involved a Federal Tax under the Federal Statute of 1909, it may not be distinguished from the case at bar for Congress has no greater authority to burden the instrumentalities of the States than the States have to burden those of the Federal Government.

POLLOCK v. FARMERS' LOAN & TRUST CO., 157 U. S. 429
METCALF & EDDY v. MITCHELL, 269 U. S. 514, 521.

EDUCATIONAL FILMS CORPORATION OF AMERICA v. WARD, 282, U. S. 379, we contend there is a close parallel between the Bridge Case and the Films Case and between the Michigan Tax Law and the New York Tax Law. The Films Case involves a New York statute providing for an annual tax on domestic corporations for the privilege of exercising their franchises in the State in a corporate or organized capacity. The tax is payable in advance for each year and is at a stated rate on the corporation's net income for its preceding fiscal year. This law is very similar to Michigan's so-called Privilege Tax Law. The only material difference being in New York the tax is based upon net income while in Michigan it is based upon net worth (paid-up capital and surplus). The plaintiff in the Films Case was the owner of copyrights granted by the United States upon motion picture films and had re-

ceived royalties for the licensing of them. The company contended that the tax was invalid on the ground that the copyrights and all income derived from them were exempt from State taxation and that the tax measured by net income was void so far as the measure included income from the copyrights, because it constituted a *tax* on *Federal instrumentalities.* This Court held in that case that the tax was not a direct tax upon allocated income of the corporation but a tax on the *privilege* of doing business in any one year. This Court said in part:

> "If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. * * * Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise."

This Court, in referring to FLINT v. STONE-TRACY and other cases, then said:

> "* * *it has been consistently held that the privilege of exercising a corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income which is made the measure of the tax may chance to include the obligations of the other or the income derived from them, and that the constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other."

The Court then mentioned other forms of excise taxes

which have been upheld upon like principles, although the statutory measure of the tax included securities constitutionally immune from any form of direct taxation. Among other forms referred to were a State income tax on income, including income from interstate commerce (UNITED STATES GLUE CO. vs. OAK CREEK, 247 U. S. 321); a State tax upon the franchise of a corporation measured by its receipts from transportation properly apportioned to the business done within the State, although it includes receipts from interstate commerce (MAINE vs. GRAND TRUNK RY. CO., 142 U. S. 217); a tax on franchises of domestic corporations measured by corporate property, even though such property be without the State (KANSAS CITY RY. vs. BOTKIN, 240 U. S. 227).

Referring to the last mentioned type of tax this Court said:

> "So well settled is this last mentioned application of the doctrine that an excise may be measured by tax immune property, that an appeal in which such a tax was assailed on the very grounds urged here, was dismissed per curiam during the present term.
>
> No. 108, NEBRASKA ex rel. BEATRICE CREAMERY CO. vs. MARSH, decided Oct. 20, 1930."

Further quoting from the FILMS Case it was said by this Court:

> "• • •Having in mind the end sought, we can not say that the rule applied by this court for some 70 years—that a nondiscriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax-exempt property or income in the measure of it—has failed of its purpose, or has worked so badly as to require a departure from it now; or that the

present tax, viewed in the light of actualities, imposes any such real or direct burden on the Federal Government as to call for the application of a different rule."

By the same line of reasoning we contend the tax imposed by the Michigan law is valid in its application to the Bridge Company.

In view of the history of Michigan's Privilege Tax Legislation we believe this Court will agree that Michigan had no *major purpose* to strike at the business of the BRIDGE CO., or the privilege of engaging in a stated business, even though it be deemed the carrying on of commerce. There was no ulterior or sinister motive such as would invalidate its legislation, but quite to the contrary, should the business of the corporation be construed that of foreign commerce, it is but incidental in connection with the efforts of Michigan relative to taxing corporations on a legally permissible basis, the *right* or *privilege* to *exercise corporate franchises.*

THE PACIFIC CO. vs. JOHNSON, (supra) California case, involves the constitutionality of that portion of the Bank and Corporation Franchise Tax Act of California, measuring the amount of the State corporation franchise tax by percentage of net income and including within the income by which the amount of the tax is measured interest received from "Federal, State and Municipal or other bonds". The law was attacked upon the grounds of unconstitutionality as in the case at bar and this Court held the law valid and said in substance the corporate franchise, or privilege of doing business in corporate form, does not cease to be a legitimate subject of taxation because it is exercised in the acquisition

and enjoyment of non-taxable property. Upon the same theory we submit the corporation *franchise* or *privilege* of doing business in Michigan is a legitimate subject of taxation even though the *privilege* may include the carrying on of commerce by said corporation, which we deny.

In HOME INSURANCE CO. v. NEW YORK, supra, a statute of New York imposed a tax upon "the corporate franchise or business" of corporations doing business within the State measured by the extent of the dividends made or declared during the year. The Court held that the tax was an excise or privilege tax and not violative of the provisions of a federal statute exempting bonds of the United States from taxation, although a portion of the dividends may have been derived from interest on capital invested in such bonds.

In KANSAS CITY, FORT SCOTT & MEMPHIS RY. CO. v. BOTKIN, supra, a statute of Kansas imposed a tax upon domestic corporations to be computed according to the amount of their paid-up capital stock. The corporation objected that the effect of the statute was to tax its income from interstate commerce. Mr. Justice Hughes, writing the opinion, said (at p. 232):

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the State court. We take it to be simply a tax on the privilege of being a corporation, —on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized

and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in SOCIETY FOR SAVINGS v. COITE, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in HOME INS. CO. v. NEW YORK, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in FLINT v. STONE-TRACY CO., 220 U. S. 107, 165. It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. DELAWARE RAILROAD TAX, 18 Wall. 206, 231, 232; STATE RAILROAD TAX CASES, 92 U. S. 575, 603; PHILADELPHIA & SOUTHERN S. S. CO. v. PENNSYLVANIA, supra; ASHLEY v. RYAN, 153 U. S. 436; CORNELL STEAMBOAT CO. v. SOHMER, 235 U. S. 549, 559, 560. And, agreeable to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (BALTIC MINING CO. v. MASSACHUSETTS, supra), to emphasize the necessary caution that 'every case involving the

> validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Appellant may attempt to distinguish this case upon the ground that the tax is upon the *franchise to be* rather than upon the *franchise to do* as in the instant case. This should be unimportant inasmuch as the principal involved is the same in either case—that of the State's exaction of a franchise tax, for corporate privileges granted.

HUMP HAIRPIN CO. v. EMMERSON, supra, UNITED STATES GLUE CO. v. OAK CREEK, supra, UNDERWOOD TYPEWRITER CO. v. CHAMBERLAIN, supra, NATIONAL LEATHER CO. v. MASSACHUSETTS, supra, further establishes the principle that an excise on a corporation may be measured by its outstanding capital even though such capital be *used* in or *derived* from *interstate commerce.*

We submit these cases are authoritative and controlling in the case at bar.

It is further submitted the Court below was entirely correct in the former case, DETROIT INTERNATIONAL BRIDGE COMPANY v. CORPORATION TAX APPEAL BOARD, 257 MICH. 52, when Mr. Justice Sharpe in commenting upon the nature of the tax, has this to say: (R-57)

"We are impressed that in the discussion of this matter counsel lose sight of the nature of the privilege fee sought to be collected. It is not a tax upon the proceeds of the business of a corporation. It in no way involves the tolls collected from those using the bridge as a means of transportation between Detroit and Canada. It is a fee imposed by law 'for the privilege of exercising its franchise and of transacting its business within this State' ".

It is our contention it is definitely settled law that the State may impose a privilege or franchise tax upon corporations for the *existence* of the *right* to exercise corporate franchises regardless of the kind of business in which they may engage.

B.

The tax imposed by Section 4 of the Tax Law is a tax upon the privilege of exercising the corporate franchises or doing corporate business within the State and is a true excise tax. It is not a tax upon the property or business. The net worth of the corporation (its paid-up capital and surplus) for a preceding year being used merely as the measure of the value of the future exercise of the privilege.

Unquestionably Michigan intended by Section 4, of Act 85, Public Acts of 1921, as amended, to impose an annual privilege or excise tax upon corporations not excepted in said act. It has enacted that such corporations shall pay in advance an annual tax, which, in the case of domestic corporations, is

"for the *privilege* of *exercising its franchise* within this State". The paid-up capital and surplus of the corporation for the preceding calendar or fiscal year are used as the measure of the value of the privilege.

That the tax so imposed is an excise or privilege tax has been definitely settled by the decisions in the following cases:

UNION STEAM PUMP SALES COMPANY v. SECRETARY OF STATE, 216 Mich. 261
DETROIT PROPERTIES CORPORATION v. STATE, 254 Mich. 525
DETROIT INTERNATIONAL BRIDGE CO. v. CORPORATION TAX APPEAL BOARD, 257 Mich. 52
DETROIT INTERNATIONAL BRIDGE CO. v. CORPORATION TAX APPEAL BOARD, 267 Mich. 384 (Advance Sheets)
COBBS & MITCHELL v. CORPORATION TAX APPEAL BOARD, 252 Mich. 479.

The construction placed upon Act 85, Public Acts of 1921, as amended, by its State Supreme Court in the cases enumerated, supra, and which has been sustained and upheld by this Court in PEOPLE of THE STATE OF MICHIGAN v. MICHIGAN TRUST CO., 286 U. S. 334, and in which it was said:

> "We are not required to choose from these diversities the construction that would appeal to us as the most consonant with reason if choice were wholly free. Choice as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to that the courts of the State, if they have spoken pronounce the final word. The decision of the Supreme Court of Michigan in re Detroit Properties Corporation, 254 Mich. 523, is a controlling adjudication as to the meaning and application of the

> privilege fee exacted of Michigan corporations. The court held that the tax was imposed upon the privilege to 'do'; that this privilege existed though nothing was ever done: * * * The tax in controversy is a State tax, and is laid not on the doing of business but on the mere privilege to do it. The State decision as to its meaning would control in case of conflict, but conflict there is none."

is proof conclusive of the *nature* and *kind* of tax under consideration. Unquestionably it is an excise exacted by the State for the *existence* of a *right* to do business in Michigan, which right Appellant has held during entire period covered by tax. If the State is attempting to tax the mere *existence* of a right not the *exercise* of it by the Bridge Company, then it is obvious this case involves but one inquiry, viz: *Has the Bridge Company held, during the period covered by the tax exaction, a right to do business in Michigan?* The answer must be in the affirmative. Since the tax is aimed at the *existence* of the right rather than the *exercise* of the right, it is apparent then an adjudication of the tax does not properly involve any inquiry as to what *kind* of business the company has been doing, or in which it may engage, whether foreign commerce or under a federal franchise, etc. The fact remains that Appellant applied for and has held during the entire period a *franchise* from the State of Michigan, and the mere *existence* of such a *right* is the object against which the tax is aimed.

It will be admitted the construction of the Michigan statute as announced by our Michigan Supreme Court in its decisions (supra) will not be challenged by this Court. The fact that the amount of tax exacted is computed on the basis of the value of property which might be used in foreign commerce does not inject a federal question in this case. So long as the tax is aimed at the

right to do intra-state business it is immaterial that the amount of the tax is predicated on the value of the property which might be employed in foreign commerce.

Since the tax in question is a tax on the *right* to do intra-state business and since the amount of such a tax may lawfully be computed on the value of property used in foreign commerce it is apparent the method employed by the State of Michigan in computing the amount of tax will not be questioned by the United States Courts as being a burden upon foreign commerce.

We submit the construction placed upon Michigan's so-called Privilege Tax Law by its Highest Court was made in accordance with applicable decisions of this Court. See:

PEOPLE EX REL. BASS, RATCLIFF & GRETTON, LTD. v. STATE TAX COMM., 232 N. Y. 42
NEW YORK v. JERSAWIT, 263 U. S. 493, 496
HOME INSURANCE CO. v. NEW YORK, 134 U. S. 594
KANSAS CITY, FORT SCOTT & MEMPHIS RY. CO. v. BOTKIN, 240 U. S. 227.

The questions under consideration by this Court in the cases, supra, were taxes upon a *privilege* granted and not upon the *exercise* of the privilege. Since the tax in question bears no relation to the exercise of the franchise, see: G. H. HAMMOND COMPANY, 246 MICHIGAN 179, it is equally true it has no relation to the particular kind of business in which a corporation may engage.

In a very recent case, ANGLO-CHILEAN v. ALABAMA, 288 U. S. 218, wherein the validity of the Alabama privilege tax law in its application to a new York corporation engaged in foreign commerce was the issue and wherein the statute was construed as being based

upon the *actual doing of business* rather than the *right* or *privilege,* this Court proceeded to make this distinction:

> "The Alabama statute is unlike that of Michigan examined here in *Detroit International Bridge Co.* v. *Michigan,* 287 U. S. 295, and *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334-342. There the tax upon a domestic corporation was imposed for the *mere right* to transact business." (Italics are ours)

We submit the Bridge Company is liable for the privilege tax because it is *organized* under Michigan Law and enjoys the *privilege* of exercising its franchise conveyed by the State.

C.

Michigan has not attempted under the guise of an excise tax to tax the business or property used exclusively in foreign commerce or the privilege of engaging in foreign commerce.

Appellant admitted its liability for the privilege tax up to and including the completion of the bridge in 1929. Its annual reports were filed and privilege fees paid for several years following its incorporation and hence it cannot claim the Michigan statute was *aimed* at the *kind* of business in which it might engage. In the instant case, not only has the statute been heretofore authoritatively construed as imposing a true excise tax, but there can be no suspicion that there has been any attempt by our Legislature to reach or tax the Bridge Company for engaging in any stated kind of business. The tax is for the *privilege* of exercising its *corporate franchise.*

In ASHLEY v. RYAN, 153 U. S. 436, Mr. Justice White in delivering the opinion for the Court said:

> "The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. Revised Statutes of Ohio, sections 3239, 3382 and 3384b, amended by act of April 11, 1890, 87 Ohio Laws, 183, 184. Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its powers to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. * * * Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for

> the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

Michigan's annual privilege tax was contained in the statutes when the Bridge Company was incorporated. Under the reasoning in the case, supra, the Bridge Company accepted the annual fee provision as a part of its obligation to the State creating it and should be estopped from now entering a denial of the State's right to impose the tax.

The effect of the decisions which we have cited and which seem to be conclusive upon the point at issue is in no way impaired by the decision of this Court in MACALLEN CO. v. MASSACHUSETTS, 279 U. S. 620, where Legislation was drawn to reach the property expressly excluded under the Federal Constitution.

POINT II.

The Appellant is not entitled to the relief asked in this case assuming this Court holds the law constitutional in its application to Appellant—that of exemption of the value of the property from the computation of the tax—because of its being used exclusively in foreign commerce for the reason the Bridge Company is not engaged in carrying on commerce and its property is not so used by it.

We believe should the corporate assets of this cor-

poration, represented by the value of the bridge structure be excluded from the measure of the tax, no one except the *user* of this bridge is entitled to claim the exemption.

We contend the Detroit International Bridge Company is not engaged in foreign commerce. It is not a carrier. It transports neither persons nor freight across the Detroit River and is not engaged in commerce of any kind. This constitutes in brief the opinion of our State Supreme Court. The Bridge Co. merely collects toll or a temporary license fee of pedestrians and owners of vehicles for the use of the bridge. While this traffic over the bridge may be construed commerce, yet the Bridge Company, itself, does nothing in the way of commerce.

See: 4 R. C. L. p. 560.

> "Where the charter of a Bridge Company confers upon it the franchise and powers of building, maintaining, and operating its bridge and approaches designated as its terminal facilities, such franchises and powers do not, in and of themselves, constitute the Bridge Company a common carrier of property; on the contrary they are appropriately confined to the erection, operation, and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private persons, upon making compensation therefor."

See: 12 C. J. p. 37.

> "It is not an act of interstate commerce to build and rent a bridge for the purpose of interstate commerce."

Lust, in The Digest of Decision of the Interstate Commerce Act Vol. 1, p. 213, states:

"Bridge companies; Construction of charters; Common carriers; Where the charter of a Bridge Company confers upon it the franchises and powers of building, maintaining and operating its bridge and approaches designated as its terminal facilities, such franchises and powers do not in and of themselves constitute the Bridge Company a common carrier of property. On the contrary they are appropriately confined to the erection, operation and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties, upon making compensation therefore in the shape of reasonable tolls," and cites Kentucky and Indiana Bridge Company v. Louisville and Nashville R. Co., 2 I. C. R. 351.

In Paragraph H on the same page it is further stated:

"Where the charter of a Bridge Company makes its bridge and approaches thereto such as it had authority to construct a public thoroughfare or highway for the use of which, by railroads or street cars, wagons, vehicles, animals, and foot passengers, it was authorized to charge 'reasonable tolls' • • • is strictly applicable to charges for the use of its highway rather than to compensation for transportation services which the Bridge Company may perform or be permitted to render."

We contend the Bridge Company merely furnishes an instrumentality by means of which commerce may be carried on by those making payment for the use of it. If the Bridge Company furnished transportation for passengers and goods over its structure, and actually carried out the purposes as carrier, we would have a different question, but such a question is not before us and therefore not an issue in this case. The Bridge Company is an owner—not a carrier. We admit the State cannot

impose a burden by taxation on foreign commerce. But on the other hand, the State may impose a franchise tax upon a corporation's *right* to do business, even though the corporation whose franchise is taxed is engaged in foreign commerce. See:

MAINE vs. GRAND TRUNK RAILWAY CO., 142 U. S. 217, 227, 228
WISCONSIN-MICHIGAN RAILWAY CO. vs. POWERS, 191 U. S. 379
BALTIC MINING CO. vs. MASSACHUSETTS, 231 U. S. 68

Counsel contends the Bridge Company as owner, because of its right to maintain the bridge and charge toll for its use, is engaged in commerce. This position does not seem well considered and counsel has cited no case sustaining such position.

Let us assume an instance where a corporation was organized for the purpose of constructing railway coaches which it leased to a carrier. The corporation maintained such coaches over the period covered by the lease. The carrier would be engaged in commerce, the coaches would be engaged in commerce, but could it be contended that the owner and builder was exempt from the privilege tax for the reason that:

1. That it was engaged in interstate commerce or,
2. That it was engaged in the maintenance, ownership and operation of an instrumentality of such business. Obviously such contention would be absurd; and yet the analogy of such situation to the facts of this case is readily apparent.

With the cases and authorities hereinbefore cited, we refer to the following decisions of this Court in support of our contentions.

The HENDERSON BRIDGE COMPANY vs. KENTUCKY, 166 U. S. 150, is a leading case and is sufficiently analogous to be decisive of this case. The suit was against the Bridge Company having an interstate bridge across the Ohio River. The suit being for the purpose of collecting intangible property tax. It was contended (as in this case) that the tax was a burden on interstate commerce; that the Bridge Company was engaged in interstate commerce:

> "Clearly the tax was *not* a *tax* on the *interstate business* carried on over or by means of the bridge, because the *Bridge Company did not transact such business.* That business was carried on by the persons and corporation which paid the Bridge Company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in New York, L. E. & W. R. Co. v. Pa., 158 U. S. 431, 439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance' ". (Italics are ours)

While the last mentioned case did not involve precisely the same character of tax as involved in this case, nevertheless the fact remains that the Court was called upon as in this case to decide whether an interstate Bridge Company is engaged in interstate commerce where it per-

mits others to use the bridge upon paying for such privilege; and the Court affirmatively declared that such Bridge Company was not so engaged. Counsel undertakes to distinguish this case by pointing out that another character of tax was involved, but we fail to see where such distinction weakens the effect of such decision as an authority in this case. The Court found it necessary, in determining liability, to answer the same abstract question which is presented in this case, viz: *Is the owner of this Interstate Bridge Company engaged in interstate commerce?* The Court answers the question in the negative. We fail to see why such answer would be inapplicable to this case merely because of the variation of facts pointed out.

See the Decision of the Kentucky Court of Appeals in this same HENDERSON Case (31 S. W. 486) in which the Court said:

> "This defendant company is not engaged in commerce or transportation at all. It has no authority or power or franchise to engage in commerce or transportation. It was simply authorized to build this bridge, and, when built, then the railroads that may be engaged in transportation, and so indirectly engaged in commerce, may transport merchandise and passengers over its structure, in consideration of reasonable rate of toll for so doing."

In ARKANSAS & MEMPHIS RY. BRIDGE & TERMINALS CO. vs. STATE, 174 ARK. 420-295 S. W. 378 (Certiorari having been denied by the Supreme Court, 275 U. S. 548). The facts in this case are almost identical to the case at bar and should be controlling. In that case the State of Arkansas attempted to enforce its privilege tax against the Arkansas & Memphis Ry. Bridge & Terminals Co., for the privilege of doing busi-

ness in the State. The Bridge Company was organized in Tennessee, but had been admitted to do business in Arkansas, therefore became subject to the imposition of the franchise tax.

Plaintiff contended its sole purpose was ownership and operation of an interstate bridge and therefore it was engaged exclusively in interstate commerce, and that the franchise tax imposed by the State was necessarily a tax upon interstate commerce. These contentions were denied by this Court in refusing to entertain the writ of certiorari.

The distinction pointed out by Appellant in this ARKANSAS case,—that the Bridge Company did not operate the bridge, but leased the structure to others—is without force or effect. The fact that the owner of the property leased it to a carrier would be in the same category as the Detroit Bridge Company, owner, collecting tolls and rentals from individuals choosing to use the bridge. In either case it represents remuneration for the use of the bridge. While it may be conceded there is a difference, it is without distinction.

KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY CO. vs. BOTKIN, 240 U. S. 227. In that case the tax was an annual privilege tax on domestic corporations. It was measured by capital representing property used in interstate commerce whether within the State or without.

The Michigan privilege tax statute is fairer than the one in the cited case, because only property in Michigan is used in measuring the amount of privilege tax due. We believe this case is in point with the one at bar.

Appellant's attempt to distinguish this case by stating

it was an annual privilege fee imposed upon the privilege of "being" or continuing "to be" a corporation rather than on the privilege "to do" is absurd. It is a privilege tax in either case imposed by the State upon corporations of its creation. The franchise "to be" as pointed out in the UNION STEAM PUMP SALES CASE, 216 MICH. 261, is the initial franchise paid but once, upon the formation of the corporation, while the privilege tax is an annual fee exacted each year for the *privilege* of exercisicising corporate franchises whether the corporation chooses to exercise such franchises or not during any taxable period. See G. H. HAMMOND, 246 MICH. 179.

This Court in reviewing the KANSAS CITY CASE had this to say:

> "We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."

And the Court proceeds to cite authorities:

> " • • • It has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock."

This Court proceeded to point out not only the cases where the precedent for which we are maintaining has been upheld, but also the cases where the law of the State attempted to tax the *business* itself or the *privilege*

of *doing such business,* PHILADELPHIA & SOUTHERN STEAMSHIP COMPANY vs. PENNSYLVANIA, 122 U. S. 326, wherein it is said:

> "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between States and foreign countries, and from the charter of its vessels which was for the same purpose. It was necessarily concluded that the tax was imposed upon interstate commerce."

The distinction which this Court pointed out in this case applies with full force and effect to the case at bar. Michigan is not attempting to tax the *business* or the *privilege* of *engaging* in a stated kind of business, but rather is imposing an annual tax in this case upon a domestic corporation for the *mere naked privilege* of *exercising corporate powers.*

KENTUCKY & INDIANA BRIDGE CO. vs. L. & N. RY. CO., 2 INT. COM. REP., Page 351, same being the decision of a United States Circuit Court sitting in Kentucky in which the Court held:

> "The franchises and powers conferred upon petitioner of building, maintaining and operating its bridge and approaches, designed as its terminal facilities, do not in and of themselves constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties upon making compensation therefor in the shape of 'reasonable tolls'.

"The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operating and maintaining of its bridge and approaches thereto for the public purposes it was intended to subserve: That of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods, or passing as they pass over a turnpike, a canal, a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare—*and do not in any way constitute petitioner a common carrier of goods* authorized to equip its road or to charge compensation for transporting goods on or over the same." (Our Italics).

In KEOKUK & HAMILTON BRIDGE CO. vs. ILLINOIS, 44 LAW E. 299, virtually the same state of facts was presented as in the HENDERSON CASE. The Court was called upon to decide whether it would impose a capital stock tax on a Bridge Company owning an interstate bridge. The defense of interstate commerce was raised. The Court said:

"Nor was the tax a tax on interstate commerce",

and quoted from the HENDERSON decision, supra.

The Supreme Court of the State of Michigan in DETROIT AND WINDSOR FERRY COMPANY, 232 MICH. 574, a case involving the identical question as here presented, although the Ferry Company admittedly was carrying on foreign commerce, said:

"The Ferry Company is a Michigan corporation, and its property is located in Michigan. Its principal business is foreign commerce. The tax imposed is a specifiec tax—an excise tax. (Union

Steam Pump Sales Co. v. Secretary of State, 216 Mich. 261). It is not a property tax. It in no way interferes with interstate or foreign commerce.

"The act makes reference to the capital and surplus and takes them into account in fixing the tax, but the reference is not for the purpose of taxing the property but to determine what is a fair price to charge for the franchise privileges."

And the Court proceeds to cite many cases in support of its holdings:

MAINE v. RAILWAY CO., 142 U. S. 217
FLINT v. STONE TRACY COMPANY, 220 U. S. 107
KANSAS CITY, etc. R. Co. v. STILES, 242 U. S. 111
HUMP HAIRPIN MNFG. CO. v. EMMERSON, 258 U. S. 290

In the last cited case it was said by Mr. Justice Clarke:

"While a State may not use its taxing power to regulate or burden interstate commerce (United States Express Co. v. Minnesota, 223 U. S. 335 (32 Sup. Ct. 211); International Paper Co. v. Massachusetts, 246 U. S. 135 (38 Sup. Ct. 292, Ann Cas. 1918C, 617), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principal of the cases so holding must be re-

garded as a settled exception to the general rule. Main v. Railway Co., 142 U. S. 217 (Sup. Ct. 121, 163); Wisconsin & Michigan R. Co. v. Powers, 191 U. S. 379 (24 Sup. Ct. 107); Flint v. Stone Tracy Co., 220 U. S. 107 (31 Sup. Ct. 342, Ann. Cas. 1912B, 1312); United States Express Co. v. Minnesota, supra; Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (34 Sup. Ct. 15); Kansas City, etc., R. Co. v. Stiles, 242 U. S. 111 (37 Sup. Ct. 58); United States Glue Co. v. Oak Creek, 247 U. S. 321, 326, 327, (38 Sup. Ct. 499, Ann. Cas. 1918E, 748). The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

And in conclusion, the Court said:

"The rule forbidding a tax on interstate commerce applies with equal force to foreign commerce, but this does not aid the company, for *the tax in question is not one upon interstate* or *foreign commerce,* but a privilege tax imposed as an incident to the right to be a corporation, and exercise corporate functions by means of paid-up capital and surplus. The rule is too well settled that a State may not impose a tax upon interstate or foreign commerce to require the citation of authority. It is equally well settled that the *privilege tax* here involved is *not one upon interstate or foreign commerce.* The yardstick employed to measure the privilege tax scales the charge for corporate privileges granted and not to measure mere receipts from interstate or foreign commerce."

In the case at bar, Mr. Justice Fead, speaking for the State Supreme Court, (R-24) said in part:

"• • • We need not inquire whether plaintiff has any intrastate power under statutes regulating domestic corporations. Nor whether maintenance of the bridge is local business. Nor need the multitude of cases dealing with taxation and regulation of interstate and foreign commerce be analyzed or distinguished. In plaintiff's former case and In re Detroit & Windsor Ferry Company, 232 Mich. 574, where this court held that the fee is not a direct burden on foreign commerce, the fact that the corporations had local powers was not given weight. These cases are determinative upon plaintiff's liability for the fee.

"However, in determining the amount of the fee, the question whether the operation of the bridge is foreign commerce is presented because of the statutory exclusion from the computation of property used exclusively in interstate commerce. In this connection, 'interstate commerce' includes foreign commerce. In re Detroit & Windsor Ferry Company, supra.

"There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But this question under the statute is whether it is used in such commerce by plaintiff.

"Plaintiff conveys no persons or goods across the bridge or international boundary line. It merely collects tolls from such pedestrians or vehicles as use it. It provides an instrumentality which others may use in conducting foreign business. • • • "

and in conclusion said:

"In our opinion, the fact that plaintiff carries no persons or goods across the international line is determinative that it is not engaged in foreign commerce and its property is not so used by it.• • • "

CASES CITED BY APPELLANT DISTINGUISHED

Appellant relies upon cases which it interprets as establishing principles contrary to the rulings of this Court in the cases we have cited. It will be noted all cases relied upon by appellant represent corporations actually engaged in interstate commerce and the tax as levied in each case is directly upon the *gross* receipts of the corporation or upon the *business* transacted, either of which constitutes an interference with the power delegated to Congress. None of these cases detracts from the authority of the decisions which we have cited.

COVINGTON & CINCINNATI BRIDGE CO. vs. COMMONWEALTH, 38 LAW ED. 966, is not in conflict with the other cases cited by us. In the COVINGTON Case, the State of Kentucky attempted to *regulate interstate bridge tolls.* It involved entirely a different issue than is presented in this case. The Court, of course, denied the right of a State to regulate interstate tolls. It is interesting to note, however, that the Court, while holding an interstate bridge to be a highway for interstate commerce, remarked:

> *" • • • The Bridge Company is not itself a common carrier."*

See p. 969, 38 Law. Ed.

KINZEL vs. CHICAGO, MILWAUKEE & ST. PAUL RY. CO., 250 U. S. 130. This case comes under the Employer's Liability Act wherein an employee in charge of

certain cars was injured. It was admitted the company was engaged in interstate commerce. The Court held the employee was engaged in interstate commerce within the meaning of the act.

OZARK PIPE LINE CORPORATION vs. MONIER, THE STATE TAX COMMISSION OF MISSOURI, 266 U. S. 555, EUREKA PIPE LINE COMPANY vs. HALLANAN, 257 U. S. 265; UNITED FUEL & GAS CO. vs. HALLANAN, 257 U. S. 277.

In the above cases Appellants were admittedly engaged in interstate commerce. Any tax levied against the carrier pipe line company on oil transported would necessarily be a tax upon the commerce. These cases cited would be more in point to the Bridge Company, had Appellant found a case where the producing company was held liable for the State tax rather than the pipe line company, actually engaged in commerce.

In PEDERSON vs. DELAWARE, LACKAWANNA & WESTERN RD. CO., 229 U. S. 146. This case involves the right of recovery under Employer's Liability Act. An employee of the railroad company engaged in carrying bolts to be used in the repair of a bridge was injured. The Court held as an employee of the railroad company he was engaged in interstate commerce, but note this: *the employee was working for the railroad company, and was not working for an owner Bridge Company.*

We have found several cases holding that employees of carrier railroad companies, while engaged in repairing a

bridge, were engaged in interstate commerce; but we have found absolutely no case where an employee of a lessor or owner Bridge Company was held to be so engaged.

PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY vs. SMITH, 250 U. S. 101. In this case it was held that a cook in a camp car on a siding near a railroad bridge (which bridge was being repaired) was engaged in interstate commerce. *But again as in the previous case the cook was working for the railroad company.*

The judicial decision that an *employee* of a *common carrier* is engaged in interstate commerce is no authority for a claim that an owner *Bridge Company* is engaged in interstate commerce.

STATE vs. BATES & ROGERS CONSTRUCTION CO., 19 WASH. 183-157, PAC. 483. The same point is involved. A contractor employed by the railroad company was injured in the repair of the bridge and the Court held the employment was in the nature of interstate commerce.

We see no possible connection between cases of this nature and the one at bar. The Bridge Company is not engaged in commerce of any kind.

GLOUSTER FERRY CO. vs. PENNSYLVANIA, 114 U. S. 196; CITY OF SAULT STE. MARIE vs. INTER-

NATIONAL TRANSIT CO., 234 U. S. 333; MAYOR OF VADALIA vs. McNEELEY, 274 U. S. 676.

These cases are readily distinguishable. Pennsylvania assessed a tax against a New Jersey corporation doing a purely interstate business. Admittedly this was an interference of interstate commerce and the Court so held.

In the CITY OF SAULT STE. MARIE case a license tax is involved. This tax was exacted from everyone, whether corporation, partnership or individual before it could engage in the carrying of passengers between the American and Canadian shores. The license, it will be seen, applied directly to the business of carrying passengers. It regulated a matter which was subject to the exclusive control of Congress and was consequently unconstitutional.

The same is true of the MAYOR of VADALIA Case vs. McNELLEY, 274 U. S. 676, involving a license for operating a public ferry across the Mississippi River and carrying passengers. The question presented was whether or not the town could make its consent and license a condition precedent to the right to engage in transportation of passengers by means of ferry and it was held this it may not do. The withholding of the license would necessarily prevent the owner of the ferry from transporting passengers and there would be a direct interference of the regulation of authority belonging to Congress.

Inasmuch as the *Appellant* is not engaging in carrying on transporting none of these cases are in point.

NORTH CAROLINA RAILROAD COMPANY v. ZACHARY, 232 U. S. 248, is not authoritative or even at point with the case at bar. This case covered a damage

suit for the negligent killing of a locomotive fireman in the employ of the Southern Railway Company, lessee of the defendant, which occurred in North Carolina in 1909, and in which the Supreme Court held the lessor responsible for all acts of negligence. The Court said in part:

> "Under the local law, as laid down in LOGAN v. RAILROAD, 116 NOR. CAR. 940, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; * * * ".

Both railroad companies were engaged in interstate commerce. Obviously the facts in the case suggest the reason for the decision.

Counsel for Appellant refers to the fact that this Court has held the Federal Government may itself construct a bridge across a stream from one state to another as a means of linking up an interstate highway under the powers to regulate interstate and foreign commerce, and cites several cases supporting this holding. We are entirely in accord with this statement. However, we see no reason why the Federal Government may not construct a bridge in the interest of commerce if it so elects. The Federal Government is interested in the commerce being carried on over the bridge and in such interest logically could provide such an instrumentality. However, we fail to see where this rule applies to the case at bar. The Federal Government did not construct the Ambassador Bridge. It was built by the Detroit International Bridge Co., which we contend is not promoting commerce over its bridge by means of transportation. It merely owns the property and charges tolls for the use of

those desiring to use it. In other words, it is the traffic over the bridge which constitutes commerce, not the mere ownership of the property.

CONCLUSION

We respectfully submit the annual privilege tax of the State of Michigan is not imposed upon Appellant for the privilege of engaging in foreign commerce or any other kind of business. It is imposed for the mere *right* or *privilege* of exercising its corporate franchises. It has been and still is in the enjoyment of this privilege for which the State is exacting the tax.

Viewing the case in this light it is apparent no Federal question is involved. We therefore respectfully submit that the judgment of the Supreme Court of the State of Michigan should be affirmed.

Respectfully submitted,

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State of Michigan,
Attorney for Appellee.

ALICE E. ALEXANDER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1934.

Detroit International Bridge Company, Appellant, *vs.* Corporation Tax Appeal Board of the State of Michigan.	Appeal from the Supreme Court of the State of Michigan.

[January 14, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant, incorporated under the laws of Michigan, owns and operates an international highway bridge across the Detroit River. That State demanded that it pay, for 1933, the tax laid by the Act of 1921 as amended, (85 Public Acts 1921, 175 Public Acts 1929) which requires that "every corporation organized or doing business under the laws of this state . . . shall . . . for the privilege of exercising its franchise and of transacting its business within this state, pay . . . an annual fee . . . upon each dollar of its paid up capital and surplus . . ."; but no property or capital located without the state "and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation . . .".

The Supreme Court of the State sustained the tax. A reversal is sought upon two grounds.

That "the only power it [the corporation] has is to engage exclusively in foreign commerce"; to tax the privilege of doing this would burden such commerce and offend the Federal Constitution.

Also, that if the corporation is subject to the challenged tax, the statute requires the capital represented by the bridge structure to be excluded from the computation since this is used exclusively in foreign commerce.

The imposition has been characterized by the court below as "a privilege tax imposed as an incident to the right to be a corpora-

tion, and exercise corporate functions by means of paid-up capital and surplus". *In re Detroit & Windsor Ferry Co.*, 232 Michigan 574; *In re Detroit International Bridge Co.*, 257 Michigan 52; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218. It held the provision of the statute excluding from the computation all property used exclusively in interstate commerce [and foreign commerce] inapplicable, since the company "is not engaged in foreign commerce and its property is not so used by it".

In *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board*, 287 U. S. 295, we considered appellant's claim to exemption from the demand for 1930, under the same statute. It there appeared that in addition to general power to own and operate the bridge, and do whatever is related to that enterprise, the corporation had authority to carry on other business in Michigan and elsewhere. "It has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause". Consequently we did not consider whether it was engaging in foreign commerce, but affirmed the judgment below upholding the tax.

Subsequent to our decision, and prior to the tax year 1933, the corporate charter was amended. The powers were limited and stated thus—

> "To operate the highway bridge, known as the Ambassador Bridge, across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and the appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.
>
> "To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

The record discloses that the appellant owns, maintains and operates a bridge between Michigan and Canada across the Detroit River; that for passing over this it demands and collects tolls from vehicles and pedestrians. It "conveys no persons or goods across the international boundary line. It merely collects tolls from such persons as use it [the bridge]. It provides an instrumentality which others may use in conducting foreign commerce".

Unless by reason of what appellant is now shown to do, it engages in foreign commerce, then, considering our ruling upon the appeal challenging the tax for 1930—287 U. S. 295—clearly, the judgment below must be affirmed. The argument for reversal is, of course, ineffective if ownership and operation of the bridge do not constitute foreign commerce.

After much consideration, and notwithstanding emphatic dissent, *Henderson Bridge Company* v. *Kentucky*, 166 U. S. 150, held that a Kentucky Corporation which owned and operated a bridge over the Ohio River between that State and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. By Chief Justice Fuller this Court said (p. 153):

> "The company was chartered by the state of Kentucky to build and operate a bridge, and the State could properly include the franchises it had granted in the valuation of the company's property for taxation. Central Pacific Railroad *v.* California, 162 U. S. 91. The regulation of tolls for transportation over the bridge considered in Covington and Cincinnati Bridge Co. *v.* Kentucky, 154 U. S. 204, presented an entirely different question.
>
> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge".

We find no adequate reason for departing from the view so expressed. The judgment of the court below must be affirmed.

Affirmed.

Mr. Justice STONE and Mr. Justice CARDOZO concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.